THE

MONTHLY LAW REPORTER.

DECEMBER, 1863.

THE CRIMINAL LAW OF ENGLAND IN THE TIME OF EDWARD THE FIRST.[1]

CRIMINAL cases are more generally interesting than merely civil ones; because the circumstances inducing or governing the trial arise, not out of a technical science, but out of the passions common to all men. An interest attaches, says a very recent writer, to the literature of Criminal Trials which few are ready to deny. It would go hard indeed, if, besides the reports of mere technicalities, there be not here some glimpses of the sad romances which lie at their heart; and at all events, when the page passes a very slight degree beyond the strictly professional, the technicalities will be found mingled with abundant narrative.

Cases like those in the Appendices I. and II. of the volume of the Year Books of the Reign of Edward I. are not found in the printed Year Books. They are contemporary reports of criminal trials in the reign of that King. No cases of the kind have (it is believed) ever been before printed; and their value and interest will be admitted. From these cases and the learned preface of this volume of the Year Books, the materials for this article have been almost entirely drawn.

The Cornish Iter Roll contains inrolments of the presentations of the hundreds and burghs of accidents and offences, and of the judgments on offenders. These entries show the acci-

[1] Year Books of the Reign of King Edward the First. Edited and Translated by Alfred J. Horwood, of the Middle Temple, Barrister-at-Law. Published by the Authority of the Lords Commissioners of Her Majesty's Treasury, under the Direction of the Master of the Rolls. Appendix I. containing Reports of Criminal Cases in the Cornish Iter. Appendix II. containing Reports and Notes of Criminal Cases, temp. Edw. I. London: Longman, Green, Longman, Roberts, and Green. 1863. Royal 8vo. pp. lx.—566.

dents and offences occurring at that remote period among the people of the extreme west of England, and have, as might be expected, in many respects a strong likeness to the subjects of the trials at Assizes of the present day. However much what is called civilization advances, history and experience show that while individuals progress in moral excellence, the world at large does not. There are frequent entries of tavern brawls, where knife or sword was drawn and used with effect: of burglary and petty larceny; of deaths by accident and violence —from that of the child who, going down to the willow ground to gather flowers, was by a gust of wind swept into the water and drowned, to the stranger woman murdered by unknown hands and left stark on the plain.

Magna Charta receives an illustration from the case commencing at the bottom of p. 529. The case is so graphic that an abstract of it will not be here out of place. A man named Hugh was accused of rape. The prosecution was not by the woman, but at the suit of the King. The prisoner was brought to the bar by two persons, one of whom was his friend. The Justice told his friend that he might stand by the prisoner to give him comfort, but not to advise him. The prisoner requested that he might have counsel, but the Justice said, "You must know that the King is plaintiff in this case, and prosecutes *ex officio*, and the law does not permit you to have counsel against the King where he sues *ex officio;* if the woman were the prosecutor you should have a counsel against her, but against the King you shall not; wherefore, we command all pleaders of your counsel to leave the Court."

When they had gone, the Justice said, "Hugh, answer; Lo the thing charged against you is a very likely thing, and a thing of your own doing; so you can well enough, without any counsel, answer whether you did it or not. Moreover, law ought to be general and applicable to all persons; and the law is, that where the King is a party *ex officio*, you shall not have counsel against him; now if, in contradiction to this, we should allow you to have counsel, and the Jury should give a verdict in your favor (which, please God, they will do), people would say that you were acquitted by reason of the partiality of the Justices; consequently we do not dare grant your request, nor ought you to make it. Therefore answer." Hugh was a cautious man, and although he was (as afterwards appears) innocent of the crime laid to his charge, he knew the risks which even innocency runs from the subtleties of law, falsities of witnesses, and timidity of jurors; and he made up

his mind to take every possible technical objection, and to avail himself of every possible privilege; so he began by pleading his clergy.

"Sir (said he), I am a clerk, and I ought not to answer without my ordinary." Thereupon his ordinary appeared and claimed him. But the Justice was aware of Hugh's domestic ties, and replied, "We tell you that you have forfeited your privilege of clergy, inasmuch as you are a bigamist, having married a widow; tell us whether she was a virgin when you married her; and you may as well tell us at once; for we can find out in a moment from a jury." Hugh thought that he might as well risk the chance of a lie, and said that she was a virgin. "We will soon find this out," said the Justice. So he charged the jury, and they found that she was a widow when Hugh married her. So the Justice decided that he had lost his privilege of clergy, and required him "to answer as a layman, and agree to those good men of the twelve; for we know that they will not tell a lie on our suggestion." So Hugh answered, "Sir, by them I am accused; I will not agree to them. Moreover, sir, I am a knight, and I ought not to be tried except by my peers." The Justice replied, "Because you are a knight, we will that you be judged by your peers." The reporter then adds, that knights were named, and that Hugh was asked if he wished to challenge any of them. Hugh, however, was pertinaciously obstinate. "Sir (said he), I do not agree to them. Take whatever inquisition you like, but I will not agree to them." The Justice doubtless was used to scenes of this kind; so, in next addressing the prisoner, he mingled warnings with persuasion; but the length of the argument which he seems to have used may perhaps be attributed to the knightly rank of the prisoner, whom the Justice immediately addresses by his proper title. "Sir Hugh (said he), if you will agree to them, please God they will find for you. But if you will refuse the common law, you will incur the penalty therefor ordained, to wit, one day you shall eat, and the next day you shall drink, and on the day when you drink, you shall not eat, and *e contra;* and you shall eat barley bread, and not wheaten bread, and drink water, &c." And the reporter says that he gave a long reasoning (which it is to be wished he had set down), showing why it would be better for the prisoner not to demur, but to put himself on the jury. So Hugh gave way, but only one step. He said, "I will agree to my peers, but not to the twelve who have accused me; therefore hear my

challenges against them." "Willingly (said the Justice); but if you have any reasons why any of them should be removed, give them *viva voce*, or in writing."

Sir Hugh then made a slip. "Sir (said he), I cannot read, therefore I pray a counsel." "No (said the Justice), the King is concerned." Sir Hugh then requested the Justice to take his challenges and read them. "No (said the Justice), they must come from your own mouth." "I cannot read them," said the prisoner. "How is this (said the Justice): you claimed your privilege of clergy, and now it turns out that you cannot read?" Sir Hugh stood quiet, quite abashed. The Justice, pitying his confusion, and trying to give him confidence, said, "Do not be down-hearted, now is the time for speaking." And addressing a person in Court, he asked him if he would read the challenges of Sir Hugh. The person addressed said that he would do so if furnished with the book which Sir Hugh had in hand; and on the book being handed to him, he told the Justice that he found there set down challenges against several of the jurors, and asked if he should read them aloud. But the Justice said, "No; read them in a whisper to the prisoner; they must be propounded by his own mouth." This was done; and on the challenges being found good challenges, those challenged were removed from the inquest. The Justice then charged the inquest, and they found that the woman was ravished by some of Sir Hugh's men, and that he was not accessory. He was consequently acquitted.

The ancient severe punishment for rape was altered by the 3 Edward I. c. 13, but was revived by the 13 Edward I. c. 34. The case at pp. 499—501 refers to the option of the woman to take the man as her husband. This option was given by the Roman law.[1] Bracton[2] refers to it as obtaining in his time, and gives a curious story of the origin of its introduction into France.

The case at pp. 503—7 is noticeable for the decision of the Justices being against law, and simply to put money into the King's treasury. A man was arraigned for felony, but on producing a charter of pardon was discharged. Another man was arraigned for harboring him, and, notwithstanding the acquittal of the principal, he was made to pay a fine.

Gloves are still presented to a Justice of Assize when there is no criminal trial to be heard before him; but that a man indicted for manslaughter and procuring a pardon should, on

[1] Coke's 2nd Institute, p. 181.

[2] Lib. 3, c. 28, fol. 147 b, 148.

pleading it and receiving his discharge, give gloves to the Justice's clerk, is an ancient custom which seems not to have been hitherto known.

Abjuration of the realm occurs at pp. 513 and 527. The criminal might remain in sanctuary for forty days; if he did not, at the expiration of that period, abjure the realm or put himself on trial, all supplies of food were cut off. According to Britton (fol. 25) he had forty days after being summoned by the coroner. Bracton (1356) and Britton (fol. 25) say that the criminal might elect the port from which he would leave the country. The note at p. 509 of the present volume is in direct contradiction to this.

A *Deodand* was the thing which caused accidental death; it was anciently employed to purchase masses for the soul of the deceased. On p. 524 is a maxim by Spigurnel Justice. "Where a man is killed by a cart, or by the fall of a house, or in any other similar way, the thing that moves is the cause of the death, and shall be a deodand." But he did not mean that there was no deodand unless something moved; he only used the word "moved" in a figurative sense, to indicate the immediate or proximate cause of the death. In the case at p. 529, the stationary object from which the arrow glanced, and not the moving arrow, was the deodand. Lord Hale[1] gives an instance of a wheel only of a cart at rest being forfeited. In a Kentish Iter among the Hall MSS. at Lincoln's Inn, the Justice inquired if the cart from which a man fell was in motion; and because it was not in motion, the cart, and not the horses, was forfeited.

In "Liber Albus"[2] we find the following case:—"Of the seven-and-twentieth year" of Henry III. "A certain man, Geoffrey by name, fell from a boat into the Thames, and was drowned; no one was held in suspicion as to the same. Judgment,—'Misadventure': the value of the boat was 4*s.* 7*d.*; the Sheriffs made answer for the same," that is, exacted as a deodand, payable to the King. Deodands were abolished by 9 & 10 Vict. c. 62.

The denial of counsel to a prisoner in a criminal matter is seen in the 47th of the laws attributed to Henry I. Less than thirty years ago this barbarous rule was law in England in

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[1] Pleas of the Crown, chap. 32.

[2] Liber Albus: The White Book of the City of London. Compiled A.D. 1419, by John Carpenter, Common Clerk. Richard Whitington, Mayor. Translated from the original Latin and Anglo-Norman, by Henry Thomas Riley. London: Richard Griffin and Company, 1861. Small 4to. pp. 660.

cases of felony. It was abolished by 6 and 7 William IV. c. 114.

The origin of trial by jury is still obscure. The precise mode in which the jury was formed in criminal cases at this early period has not yet been ascertained.

The case at pp. 542–3 contains the extraordinary assertion that under the circumstances the jury might, at the option of the Justice, be of the neighborhood where the deed was done, or of the neighborhood where the prisoner was born. Mr. Horwood concludes that this may have been an error of the scribe.

ON AMERICAN SECESSION AND STATE RIGHTS.[1]

Letter from Judge Redfield, of the United States.

The number of the "Law Magazine" for August last (page 318) contained an article on the constitutional questions involved in the Secession of the Southern States of the American Union. Not agreeing, as we were careful to note, in all the opinions expressed by the writer, we inserted the article as a fair, while it was unquestionably a most able, statement of the views entertained on one side of the subject discussed therein. We have now received from Judge Redfield—a distinguished member of the legal profession, and lately a judge in America, whose excellent work on the Law of Railways we have had occasion to notice in this Magazine—the following letter in reply to the opinions expressed in the article we have mentioned. Under any circumstances we should insert Judge Redfield's letter, as an act of fairness and courtesy; but knowing his reputation as a lawyer, and his character on the American Bench, we have peculiar pleasure in affording him the opportunity of stating in this Magazine, and in his own words, the views entertained by him on the present constitutional crisis in America.—EDITOR L. M. & R.

BOSTON, U. S., Sept. 14th, 1863.

The article in your last number upon American Secession and State Rights, contains so many errors of fact and argument, and upon points so vital to the questions now in issue between

[1] From the London Law Magazine and Law Review, November, 1863.

the American Government and the *soi-disant* Seceded States, that we feel sure you will be glad to publish a brief correction of some of the more prominent ones.

The writer of that article, p. 342, thus sums up the result of his argument:—"Now from what has been said, it is apparent that the States of the American Union, being sovereign States, cannot be legally bound to the Union; that as they are not legally bound, their secession from it is not an illegal act, and that the Federal Government in attempting to adjudicate upon the right of dissolving the Federal compact by the respective parties to it, is clearly going beyond its delegated powers, and acting *ultra vires*." All this array of damaging consequences depends upon a merely gratuitous assumption.

This, nevertheless, contains the sum and substance of the article, and covers the main question at issue between the Government of the American Republic and the people of that section of its territory, which have formed the Government of the Confederate States and made war upon the old National Government of the United States.

The people of the North are, naturally, more solicitous for maintaining the confidence and respect of the English people, in their present controversy, than that of any other nation; and the same is probably true of the South. It is natural, therefore, that each should attempt to make the best of his case before the English people. And the friends of each, in your country, will naturally accept, to a certain extent, the theory of that party whose cause they espouse. But we are sure that no one familiar with the incidents of American local and general history, since the adoption of our present constitution, would have ventured to have put forth, upon this side of the Atlantic, an article containing all the erroneous statements embraced in that article. But we are satisfied that those errors were honest misapprehensions of the writer. For any one possessing the culture and general ability of that writer, must comprehend the damaging effect of such transparent errors and groundless assumptions as are to be found in that article, too well, to be willing to venture a resort of that kind, if we give the writer credit only for common sagacity and reasonable circumspection, without regard to fairness and good faith, neither of which do we feel disposed to dispute in regard to the article in question. But such an elaborate and ably written article is calculated to produce immense influence, coming, as it does, under the countenance, if without the full endorsement, of the leading Law Journal of the metropolis of the British Empire, and circulating

chiefly where its readers are not familiar with the facts or the justice of the assumptions upon which its conclusions are based.

You will be able to perceive, then, why even the States right advocate, as the present writer always has been, might feel some degree of solicitude to have the question at issue in the present controversy more fully and more correctly understood by the English people than they possibly can be from the manner in which they are presented by your contributor. That article contains the substance of the South Carolina doctrines of Nullification and Secession, which originated with Mr. Calhoun, and which have never obtained any full and cordial endorsement out of that State except by a comparatively small number of extreme men, until a few years, and we might almost say a few months, preceding the present revolt. They are not, therefore, strictly speaking, the doctrines of any school of statesmen in this country, except Mr. Calhoun and his particular admirers and followers; or they were not until the present secession began to assume shape and form, since which they have formed the life-blood of the schism.

After these dogmas were first put forth by their distinguished author and his friends, and when they had nearly culminated in a formal revolt and secession of the State of Carolina, under the administration of President Jackson, they were brought to the test of an *experimentum crucis* before the Congress of the United States, and were so completely demolished and dissipated, by the powerful, searching, and unanswerable arguments of that profound jurist and statesman, and eloquent orator, Daniel Webster, and by hundreds of other able writers and speakers both in Congress and out of it, that it was not generally believed they would ever rise again from their long and undisturbed repose of a quarter of a century.

But they are now again attempted to be maintained by those who are making such desperate efforts at the present crisis, and moving heaven and earth, as it were, to break up the American Republic. The mere fact that such doctrines were never distinctly and definitely put forth by any of the early advocates of States rights, with so acute and discriminating a thinker and writer as Mr. Jefferson at their head, through all the antagonism and acrimonious controversy between the champions of national prerogative and States rights, during a period of nearly half a century; and that even the wakeful spirit and untiring energy of Mr. Calhoun did not discover any such precise mode of escape from the possible despotism of the National Government until near middle life, would be evidence of the most

satisfactory character to all minds, the least experienced in judicial investigations, that no such thing was intended by the framers of the United States Constitution. But let us look a little more into the detail of this article.

The fundamental and fatal fallacy of the article, as we have before intimated, seems to be that it proceeds upon the gratuitous assumption that the present National Government of the American Republic is a league, or compact among the several States in their corporate capacity, which is a begging of the entire question at issue, viz., whether it be so or not. This is a question of fact, which can only be determined by the proper construction of the words of the instrument by which that National Government was created and is still upheld. And judging this constitution, by which we mean the organic or fundamental law, of the American Government by the same rules which we always apply to other written laws, or documents, it will be impossible to doubt what was the intention of the framers of that instrument, at the time of its adoption, or what has been its practical construction ever since. And when this is determined upon satisfactory grounds, it must be conclusive of the question at issue with every fair-minded man and sincere inquirer after truth, and with others, nothing will be satisfactory but success, and mastery over opposition.

We begin then, as does the writer, with the old law. The former government rested upon the Declaration of Independence and the Articles of Confederation adopted in conformity thereto. The argument of the writer of the article in question acquires its chief plausibility by the formal analysis of those instruments, with a view to show that they were the Acts of the several States, and not of the whole people. But this is a proposition against which no practical and judicious defender of the American Constitution will ever contend for a moment. We know this writer selects some passages from the commentaries of Mr. Justice Story, which seem, literally interpreted, to favor the doctrine against which he is contending. But Mr. Justice Story was not infallible; and although one of the ablest lawyers that America has produced, he was not a practical statesman, nor a careful and thorough student of public and international law; except in his own department of admiralty and prize law. In common with most other ambitious men he was, sometimes, apparently more solicitous of acquiring reputation in those departments outside his profession, than within its legitimate and proper range. He consequently committed some errors in his works not strictly of a professional character, where his opinions

are not received, upon this side of the Atlantic, with the same confidence as in some few other of his works. His commentaries, therefore, upon the American Constitution, while embracing a wide range of historical research, are not always couched in that precise and accurate phraseology which he would have used, if he had been more familiar with all the possible applications of his propositions. And having been a somewhat ardent States right advocate, before his promotion to the bench, and finding subsequently the necessity of looking more in the opposite direction from his position in the Federal judiciary, he became rather prominent and not a little ardent sometimes in defence of the extreme claims of the advocates of Federal prerogative. But the mere dictum of any man, however high or respected—and there are few American names more justly esteemed than that of Mr. Justice Story—would induce the mass of American statesmen and publicists to claim that the Declaration of Independence was in its legal effect, or in form, an act of the American people as such. It purports upon its very face, in more places than one, to be the act of the several States. The terms "Independent States," in capitals, appear no less than three times in the concluding paragraph, which is the only declarative and authoritative portion of the instrument. And of Mr. Justice Story's argument to the contrary we can only say, *aliquando bonus dormitat Homerus.*

And when it is considered that the Articles of Confederation were immediately thereafter provided for, and constantly under discussion for nearly two years, from time to time, until they were adopted and ratified by the *several States* as such; and that in these very articles it is expressly declared that "the said States hereby enter severally into a *firm league* of friendship with each other for their common defence, &c.," it must be very obvious to all that there was no belief, at that time, that any form of consolidated government had been formed by the people. It would indeed be a most forced and unnatural construction, to argue that a consolidated government of the people was created by the Declaration of Independence, and that the very next step was to form a league of the *several States.* We are confident that Mr. Justice Story and the other persons quoted by the writer in support of this theory, could not understandingly have intended to claim any such doctrine. But, as we have before intimated, the chief plausibility of the article in question arises from its unquestionable refutation of this pretended assumption on the part of some advocates of our nationality, which receives unquestionably some countenance

from the loose expositions and arguments of Mr. Justice Story. The old law being then "a league among the several States," and nothing more, we could not give the writer much credit for his labored exposition of that theory, which, so far as we know, is not now questioned by any one as to the Articles of Confederation.

We proceed to inquire, then, secondly:—

What were the defects of this law or league? These we shall best give in the language of Mr. Hamilton, a writer—who is well known both here and in England—of great clearness and point, from the fifteenth and following numbers of the *Federalist*. This writer says: "We may be said to have reached almost the last stage of national humiliation. Our ambassadors abroad are the mere pageants of mimic sovereignty." In replying to the objectors against the adoption of the present Constitution, he says: "They seem to aim at things repugnant and irreconcilable; at an augmentation of Federal authority without a diminution of State authority; at SOVEREIGNTY IN THE UNION *and complete independence of the members*. They still, in fine, seem to cherish, with blind devotion, the political monster of an *imperium in imperio*. Those defects cannot be remedied otherwise than by an alteration in the very elements and main pillars of the fabric." . . . "The great and radical vice in the construction of the existing confederation is in the principle of LEGISLATING FOR STATES OR GOVERNMENTS, in their CORPORATE OR COLLECTIVE *capacities*, and as contradistinguished from the individuals of which they consist. If we still adhere to the design of a NATIONAL GOVERNMENT, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a LEAGUE and a GOVERNMENT." . . . "We must extend the authority of the Union to the persons of the citizens—the only proper objects of Government." . . . "It must carry its agency to the persons of the citizens. The majesty of the national authority must be manifested through the medium of the courts of justice." In speaking (in No. 17, Fed. 69) of the functions of Government still left with the several States by the present National Constitution as not calculated to inspire disloyalty to the National Government, he says: "The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition."

Then follows, in successive numbers by Mr. Madison, a careful review of all the most distinguished national leagues among independent States, ancient and modern, beginning with the

Amphyctionic Council and Achaian League, and ending with a reference to the Germanic Diet, the United Netherlands, and the Swiss Cantons, showing conclusively, as the writer contends, that a mere league among the several States, as independent sovereignties, will never accomplish the desired result of an efficient National Government, such as was needed and was provided by the new constitution then under consideration.

Then follow some chapters by Mr. Hamilton, showing in detail the defects of the existing confederation, such as the "want of" proper sanction to its laws, the "want of" power to tax individuals and property, and concluding "there is no method of steering clear of this inconvenience but by authorizing the National Government to raise its own revenues in its own way."

After all this, and much more which might be adduced, it seems impossible to argue with any degree of plausibility, that the framers of the present Constitution were not fully aware that the old Articles of Confederation had proved hopelessly defective in all the essential requisites of a National Government, and that their radical and incurable defect consisted in the fact that they constituted a mere *league* or *compact among the several States;* and that this conviction was fully shared by the people at large. Nor can there longer remain, it would seem, any question that the present Constitution was formed with the express purpose of remedying such evils and defects in the then existing frame of government, by organizing a National Government which should steer clear of all such known defects.

And when we find, at the time, the most authoritative and respected advocates of the new Constitution openly avowing the necessity of abolishing the existing *league* among the States as independent sovereignties, and of creating a form of government which should operate directly upon the people, and which should absorb the leading functions of governmental administration, leaving only the regulation of the domestic police to the several States, and claiming that the new Constitution then under discussion did all this; what might we naturally expect to find in the instrument itself? And what would be our surprise if, upon looking into it, we should find it, after all, merely a league among the States as independent sovereignties, precisely of the same character as the old confederation? Should we not conclude there must be some mistake somewhere? That we had not obtained the right paper? Or that we had been misinformed in some very essential particulars in regard to the true history of the times? And if, in addition to all this, we found

that it was upon record that the opposers of the new Constitution, at the time of its adoption, objected to it as amounting to a consolidated empire—which virtually extinguished the independence and separate sovereignty of the States—which is an admitted and well-known fact, what must be our surprise if, in looking into the written document, we found it to contain in explicit terms just what this writer now contends was its legal effect, viz., that it should be in the power of any one State at any time when it became dissatisfied with the operation of the National Government to dissolve the same? Should we not conclude these men were beside themselves, or playing at cross purposes, or that their language had been confounded—as among the builders of the Tower of Babel? And yet this is precisely what this writer claims was done in the adoption of the present National Constitution. But to the testimony of facts.

That instrument will speak for itself, and we believe it will be impossible for any man to read the paper and not perceive that it was intended to create an independent national sovereignty, based upon the express assent and ratification of the people.

It begins: "We, the people of the United States, in order to form a more perfect union, establish justice, &c., do ordain and establish this Constitution for the United States of America." What could be more explicit? It is a CONSTITUTION, not a *league*, and it is ordained by the PEOPLE OF THE UNITED STATES, not by the *several States*.

We have then Article I., consisting of ten sections, and nearly fifty paragraphs, constituting a perfect legislative department for the Government, consisting of three orders or estates—Senate, House of Representatives, and President; and extending to all subjects of a national character, viz.: "The levying of taxes, duties, imposts, and excises," not upon the States, but upon the people and property of the whole empire; "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" "To establish a uniform system of naturalization;" "and of bankruptcy throughout the United States;" "To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;" "To provide for the punishment of counterfeiting the securities and current coin of the United States;" "To establish post offices and post roads;" "To secure copyright to authors, and patent rights to inventors;" "To constitute tribunals inferior to the Supreme Court;" "To define and punish felonies and piracies on the high seas;" "To declare

war, grant letters of marque and reprisal, and establish the law of captures by land and sea;" "To raise and support armies;" "To provide and maintain a navy;" "To make rules for the government, and regulation of the land and naval forces;" "To provide for organizing, arming, and disciplining the militia;" "To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all powers vested by this Constitution in the Government of the United States, or in any department or office thereof."

Art. II.—Establishes a complete and perfect executive department, the mode of its election, and appointment of subordinate functionaries, with the powers and duties of the same.

Art. III.—Provides for the judicial department of the Government, consisting of the Supreme Court and inferior tribunals, defining their jurisdiction and duties with the tenure of the office of the judges, and the mode of their support, and securing the trial by jury, together with the definition of the crime of treason against the Government of the United States.

The other four articles of this most elaborate instrument are occupied with the detail of the general duties and functions of a thorough and efficient National Government, among which it is provided that the National Government "shall guaranty to every State in the Union a republican form of government, and shall protect each of them against invasion or domestic violence."

It is also provided that the jurisdiction of the Supreme Court shall extend to all cases of law or equity arising under the Constitution, or laws and treaties made in pursuance of the same, whether affecting citizens, or ambassadors, or the several States. The courts of the nation have exclusive jurisdiction of all these questions, and of all questions in any manner affecting the functions, powers, or duties, of the national administration, including admiralty and maritime jurisdiction, and many others, too numerous to be further specified, so that in fact very little remained to the State Courts, except controversies between party and party, and such criminal administration as was exclusively of a domestic character. And all the powers and functions of the National Government are declared exclusive; and all its decrees and laws paramount. How then can such a Constitution as this is found to be, upon its very face be argued, or construed, into a compact or league among the several States? A *constitution* is an *organic law*, the *fundamental law* of some *new creation*, while a compact or league is but a treaty,

or agreement, a mere contract or negotiation, among persons, natural or artificial, already existing; it is the creation of a new State, while a league or compact is merely a negotiation among existing States. The adoption of this new Constitution then, by conventions of the people through deputies chosen by them for this express purpose in all the States, was the founding, the creation, or building up of a new State or Sovereignty, which, from that day to this, through cloud and through sunshine, through foreign wars and in domestic conflict, of a serious, and sometimes of a bitter and acrimonious character, as the writer of this article justly claims, has steadily progressed with its march ever onward, until its population has multiplied tenfold, and its extent of surface, wealth, commerce, and all that goes to create a powerful and mighty nation, has advanced thirty and even forty fold. And still this writer coolly assures us, in contradiction to every word of the organic law of its creation, and every syllable of its previous history, that all this time this constitution has been but a league among independent sovereignties, which any one of them might dissolve, in any moment, by a simple vote; the same species of government, precisely, which existed under the former attempt at national existence, and which fell into a fatal collapse, a state of hopeless syncope, almost at the very moment of its birth. It must be very obvious to remark, we think, that if such were the fact, it certainly could not have been generally so understood, and our success must be attributable largely to our ignorance in regard to our true condition, upon the principle that where ignorance is bliss, 'tis folly to be wise!

But, in all soberness, what can any fair-minded and well-informed man mean by putting forth such strange crudities? things which only show the extremes to which the necessities of the case must have driven the advocate, when he is compelled to ignore the most palpable and obvious facts of his case, and to ask his readers to accept assumptions which have no existence but in the fancy or the imagination, and to rest satisfied with conclusions which are at variance with all the facts of history, and all the results of experience.

But if we have made ourselves understood, we have said enough, perhaps, upon the main point. We desire to say a word in regard to some few of the errors and misapprehensions of this article, not specifically alluded to before. It is there assumed, that "There has long existed in America a political party or section, who maintain the dogma of an American nationality." We have said enough, perhaps, in reply to this.

The fact is patent upon every page of American history, that all parties, and all sections, with a single exception, have always maintained the doctrine of an "American Nationality." It is the "dogma" of nullification and secession, which has been maintained by a party or a section; and which has finally, after a struggle of thirty years, succeeded in pushing itself up into sufficient importance to produce a schism and separation in our great "American Nationality." But *from the first* there was no such "dogma" and no such "party."

We cannot more successfully reply to this portion of the writer's groundless assumption, than by quoting the words of President Jackson, in his memorable message upon this doctrine of nullification and secession, when it was first attempted to be put in practice by the State of South Carolina, and which was so signally defeated by the energy with which it was encountered by the National Executive of that day. This memorable message was issued by a President, and prepared by a Secretary, the Hon. Edward Livingston, of Louisiana, both of whom were Southern men, and both educated in the extreme school of States rights; brought up literally at the feet of Thomas Jefferson, who was always and everywhere the extreme champion of the extreme view of States rights, but who always had both the sagacity and the fairness to keep himself within the limits of the reasonable construction of the Constitution itself. In that ever memorable message of President Jackson, it is said:—

"I consider, then, the power to annul a law of the United States assumed by one State, *incompatible with the existence of the Union; contradicted expressly by the letter of the Constitution; unauthorized by its spirit, inconsistent with every principle upon which it was founded, and destructive of the great object for which it was formed.*" This, we think, ought to be accepted as satisfactory evidence of the true state of the question. For if there is any man against whose testimony in regard to the true exposition of the American Constitution as to States rights and Southern rights, no possible cavil can be raised, it must be Andrew Jackson or Edward Livingston, and here we have the testimony of both combined.

It is also stated, p. 321, that "the grand political division of parties into Federalists and anti-Federalists" arose in 1776, and "has prevailed to the present day." The date may be a misprint; unless it is, it antedates the period of the existence of that division of parties in the Republic more than twenty years. And the terms, and the manner of their use, convey a

false impression—viz., that the anti-Federalists advocate the views of the writer, which, as already shown, is not true in any fair and just sense. The school of Mr. Calhoun, of which the writer in question appears to be an ardent disciple, sprung into existence after the contest between the Federalists and their opponents had been completely buried under the quiet administration of the National Government for eight years, by Mr. Munroe, whose name has long been associated with the American doctrines of non-intervention in American affairs by the European States, although the authorship of the doctrine is, perhaps, more justly attributable to his Secretary of State, Mr. John Quincy Adams, who had originally been a Federalist himself. But the President and the Cabinet generally, including Mr. Calhoun and Mr. Crawford, were Southern men, and ardently devoted to States rights, being all of the school of Mr. Jefferson; even Mr. Adams having abandoned the Federalists, and given in his adhesion to the opposite school as early as 1808, before the close of Mr. Jefferson's administration, and gone abroad under the appointment of Mr. Madison, at the beginning of his administration. After the inauguration of Mr. Munroe, the personal friend and ardent admirer of Mr. Jefferson, the Federalists submitted at discretion, and, as a party, have not been heard of since, except in history. But the government nevertheless has always been administered substantially upon the principles maintained by the Federalists, with the important qualification that all the reserved rights of the States must be maintained inviolate.

The writer of the article in question incidentally claims the authority of the Kentucky and Virginia resolutions of 1798, 1799, and even that of Mr. Jefferson himself, in his official papers as President, and in his correspondence, after his retirement from public life, in favor of the right of secession. And the same has been claimed by other advocates of that doctrine. But Mr. Jefferson nowhere claims any such right as the result of the Constitution, or of any reserved right in the States. The most which the resolutions referred to claim, is, that the States might interpose whenever their reserved rights under the Constitution were denied them, without attempting to define the mode of such interposition. And when Mr. Jefferson speaks of the not improbable event of a future separation of the States into two or more governments, he evidently refers to some amicable, possible, future arrangement of that kind.

When this writer speaks of new States being admitted into the Union by means of secessions from the older States, he

either labors under a misapprehension himself, or else uses language in such a loose manner as to convey a false impression. It is not true that any new States which originally formed portions of the old thirteen States, have been received into the Union or National Government, since the adoption of the present Constitution, except by the express previous consent of those States, induced by no constraint or compulsion, even of circumstances, with one exception, not alluded to by the writer. In regard to the instances which he names, Vermont had claimed to be an independent State before the Declaration of Independence, and had adopted its constitution, and completed its organization as early as the 4th of July, 1777. The controversy with New York grew out of a disputed boundary between the original grantees of the colonies of New Hampshire and New York; but this was completely adjusted, and New York released all claim to the territory and abandoned all pretension to jurisdiction over any portion of the present State of Vermont, before that State was received into the Union, for an agreed consideration which was paid her by Vermont. As to Tennessee having forcibly seceded from North Carolina, or Kentucky from Virginia, or Maine from Massachusetts, there is not the slightest ground for any such pretension. Those separations were made in every instance with the full concurrence of the old States.

If the writer had desired an instance of compulsory secession and the admission of a portion of the territory of one of the old Thirteen into the Union, as a separate and independent State, he might have found something much more to his purpose than anything named by him, in the recent admission of West Virginia, as a separate and new State. That act of the National Congress, since the existence of the present contest, has very much the appearance of receiving a seceded State from one of the old States of the Union into communion with the Government, without the consent, and against the known will, of the pre-existing State organization. If so, it is clearly against the express letter and the obvious spirit of the Constitution, and will be liable to present very serious obstacles in the way of any future adjustment of the existing difficulties involved in the American controversy, between the inhabitants of the seceding States and the National Government. But we are not in the counsels of the National Cabinet, and of course could not fully and fairly present their views. If the writer had quoted this instance, instead of those he did, we should have found ourselves in an embarrassing dilemma in attempting

to meet the case. But we suppose it fair to say, that in times of war all parties feel compelled to adopt some expedients not precisely defensible under the strict letter of their commissions. *Inter arma silent leges.* And it is well known that the American Government has ventured upon some theories of their own functions and powers, and those of the seceded States, which to their older and more prudent friends and supporters have appeared very questionable, to say the least. But the administration of public affairs, in both sections of the American Republic, is now in the hands of young America, and the steam is up, and the danger is of some fatal and irreparable collision, in such a mad and dare-devil spirit, that no space for restoration will remain. We are not among the number of those who believe that the blame is exclusively upon one side, either in regard to the beginning, or the conduct of the present controversy. It would not surprise us to find the Republic ultimately broken into more than two irreconcilable sections. We have feared that it might be so from the first; and the fact that the American Republic has been able to maintain its credit thus far, under the most unprecedented accumulations of public debt, and that its military and naval armaments have met with unexampled success, against a most unheard-of resistance; and that this has been done under the most unaccountable vacillation in the executive administration, both as to commanders and plans for military operation, has not been sufficient to remove entirely our painful fears and misgivings as to the final result in regard to the American question.

We hope for the best, but we sometimes fear the worst. The fact that so many in the acknowledged confidence of the administration put forth such strange theories in regard to the mode of treatment of the seceded States, is not calculated to establish the confidence of any not stubbornly bent upon seeing nothing but success.

The hypothesis that the fifteen seceded States have, by the Act of Secession, forfeited all State rights, seems to be based upon no just appreciation of the issues properly involved in the controversy. It is really treating the matter from the same precise stand-point which the Confederate States assume, viz., that the States are the parties to the controversy. If that be conceded, it will be difficult to escape from most of the conclusions of the writer in question. For as is well argued by him, if the States are the only parties to the compact, they cannot be dealt with as rebels, or traitors, since they are incapable of committing either rebellion or treason. And although this

writer concedes that such a compact may render the citizens of the several States liable to punishment for treason, it seems to us, that in that respect, he concedes more than the assumption upon which his argument proceeds will require of him.

For if the States are the only parties to the compact, and they are acting therein as absolute independent sovereigns in all respects, and to all intents, it is difficult to perceive how they could by such a compact bind their citizens to such an allegiance to the confederacy, as would render them capable of committing the crime of treason. For the allegiance of the citizens must always be to the paramount sovereignty, and if that resides in the States exclusively, according to the construction of this writer, it is not easy to comprehend how any such allegiance of the citizens is transferred to the confederacy by the compact as to enable them to commit the crime of treason against the nation. For treason consists only in a breach of the obligations of allegiance, and where no such duty exists, its breach would be impossible. Hence the fact that the United States Constitution specially provides for the punishment of treason, has always been regarded in America as a most conclusive argument that it was the purpose of the instrument to create a national sovereignty to which allegiance was due.

When, therefore, we speak of the Seceded States or the Rebel States, we do not precisely express the full import of the facts. And when the friends of the administration speak of the forfeiture of State rights, they use language more appropriate to the theory of those in arms against the Government than to the provisions of the Constitution. And we have never been able to comprehend the theory which treats the Southern States as having forfeited any of their State rights. If the rebellion is put down, and the people of those States return to their allegiance, we cannot comprehend why or how any of the laws or constitutions of the States will have ceased to be of binding force. The claim that they have ceased to be of binding obligation seems to us to rest wholly in misconception of the true relations of the States in their corporate capacity to the national sovereignty. And the claim of any such forfeiture of the State laws and Constitution seems to us as truly a usurpation as the rebellion itself, so far as the theory of the thing is concerned. And such a theory must necessarily interpose a very serious barrier against the future restitution of the empire in its original character.

For if the States have forfeited all their rights, and may be held as conquered provinces of the empire, and all their laws

and even property rights disregarded, without reference to the guarantees contained in the National Constitution, we do not perceive why this will not practically result in the establishment of a military despotism, wholly irresponsible to all law over the entire territory of these States now in rebellion. And after this *fait accompli*, he must be a sanguine and hopeful man, who expects the prevalence of the same free principles in any portion of the empire, which have thus far obtained to a certain extent, at least in the remaining portions of the Republic which have never swerved from their allegiance. But the experience of the last two years has afforded many painful instances of that disregard of personal rights even in the loyal States, which would not lead any one to feel much surprise at finding the American Republic speedily converted into one of the most iron-handed military despotisms which the world has ever known. But we hope and we expect better things. The present National Executive is, no doubt, an honest and sincere man, and one who earnestly studies, within his own sphere of vision and comprehension, the best interests of the country; and he has thus far been more successful in dealing with one of the most gigantic conspiracies against his legitimate and government authority, which could be well conceived, than could have been anticipated. The arms of the nation are now everywhere successful, and the credit of the Republic is almost perfect with all its legal supporters. Under such success there is perhaps more danger of despotism than of anarchy. We have only alluded to these threatened dangers to disabuse the readers of this article of any apprehension that we came here as the hired advocate of the Government. That would be the last post we should expect to attain. Our whole life, till within a very recent period, has been devoted to the administration and defence of State laws, and we have never held any place of trust or responsiblity under the National Administration. But the truth must be maintained, and we could not forbear this brief exposition of the numerous fallacies of the article in question. We doubt not that your sense of justice will induce you to desire the publication of this brief exposition of the subject, as held by the great majority of the American people, however imperfect it may be.

ISAAC F. REDFIELD.

"PRACTICE AND PLEADINGS IN ACTIONS IN THE COURTS OF RECORD IN THE STATE OF NEW YORK UNDER THE CODE OF PROCEDURE." By HENRY WHITAKER, COUNSELLOR-AT-LAW. New York: 1863. 2. vols. pp. 2091.

THE colonists who first settled the original States of the Union, brought with them the English common law, and, with some modifications, adopted its system of practice and pleadings. In some of the colonies, great changes were made at a very early period. This happened in Massachusetts. Others adhered with much strictness to the system of special pleading, and the practice of the English courts under it. Among them was New York, and the English system remained substantially unchanged there until the adoption of their new constitution in 1846. The English system of chancery was also preserved there till that time. The Constitution abolished the entire system of the State Judiciary, and adopted one that was novel. It also provided for the appointment of commissioners "to revise, reform, simplify and abridge the rules and practice, forms and proceedings of the courts of record." Under this provision a code of civil procedure was reported in 1850, and was soon afterwards adopted. It was designed to be a popular system; and in order that it might be more easily understood, it substituted popular language for technical language to a great extent. Its pleadings more nearly resemble those used in chancery proceedings, than those used in courts of common law. The experiment has been an interesting one, especially to lawyers; and as it was devised and framed by men of high professional standing, it was probably as well devised as it could be upon the basis adopted.

The volumes whose title we have placed at the head of this notice contain the results of the system up to September, 1862. Mr. Whitaker is a native of England, and was a highly respectable member of the English Bar. He came to New York some twenty years ago; has a high standing at the Bar of that city, and is thoroughly learned in the profession. His work is one of acknowleged ability.

The first and most remarkable fact that has attracted our attention in the perusal of this work, is the immense mass of legal machinery that is required for the operation of judicial proceedings in that State, and the vast amount of litigation that it has given rise to. Here is a huge Digest, and the authorities it cites are the following:—

1. The New York Reports, which contain the decisions of the Court of Appeals, 23 vols.
2. Barbour's Supreme Court Reports, 35 vols.
3. Superior Court Reports, 17 vols.
4. Common Pleas Reports, 6 vols.
5. General Practice Reports, 50 vols.;

making in all 131 volumes of reports for a single State in the course of about fifteen years. Fifty of these have been created by the new system of procedure; and in the others, decisions on the same subject are strewed very thickly since the adoption of the code. Intelligent members of the Bar in that State, think that the harvest of questions respecting pleadings and practice, so far from being already gathered in these volumes, is as yet only in its fair beginning.

The number of questions decided in these volumes which relate merely to the "net of forms," must be between twenty and thirty thousand. It is a great tax upon the time and strength of a young lawyer to learn this mass of procedure; and something of a tax upon his purse to obtain the books. And as taxable fees are comparatively quite large in that State, there must be some tax upon clients. Many of the questions are elaborately and ably discussed, and counsel fees must have amounted to a considerable sum—somewhere among millions.

Of course these volumes contain a great many discussions and decisions relating exclusively to the merits of cases, and not occasioned by the friction and uncertainty of legal machinery. But one who will look over them will see that the amount of labor which is imposed upon the court and Bar, and the cost to which the administration of justice is subjected, for the mere procedure, not relating to the merits of cases, is enormous.

Let us refer to a few particulars. Actions are commenced by a complaint. In Massachusetts this document would be far from being considered brief. We had, not long since, occasion to send to that State two drafts for collection, and property was to be attached. In the course of a few days we received from an attorney a complaint which was to be sworn to. It contained, as the code requires, a simple statement of the case, but it occupied nearly three foolscap pages of manuscript. The form of complaint was intended to be so simple as to avoid all misunderstandings and questions. But in Mr. Whitaker's book, nearly three hundred pages are occupied with a digest of decisions upon the complaint alone.

The defendant pleads by answer or demurrer. Twenty-two pages are occupied with his digest on demurrers, and eighty-seven pages with his digest on answers—and a great part of these pages is composed of a brief, well considered digest of decisions of the courts in litigated cases. His two volumes contain, as we have seen, over two thousand pages, but this includes various tables, such as names of cases, contents, &c., and among other things, an appendix of forms occupying one hundred and twenty-three pages.

It is not necessary to enter into further details, nor have we space for them. We turn now to the system of legal procedure in Massachusetts. Our practice act was adopted in 1851, and in 1852 it was modified by striking out all the pleadings after the answers, except in cases where the court should order a replication, or the plaintiff should choose to file one; so that it has been in operation nearly as long as the New York code.

The act did not meddle with the pleadings in real actions; for they had already been reduced to the utmost possible simplicity. Titles to real estate are tried by a writ of entry counting on the demandant's seisin; and the plea is the general issue, with specifications of any special matter of defence. The course of procedure in these actions is so plain that a question hardly ever arises about it. Indeed, there are very few questions of any kind touching land titles, which parties are obliged to bring before our courts. Sometimes a question of fact arises about lines, or acts of possession, or the construction of wills or contracts,—but there is very little else. Conveyances are so simple that most intelligent men can make them, and titles are easily traced in our records. Mortgages are foreclosed with an expense of a few dollars, by means of a conditional judgment; and their redemption by bill in equity is also cheap.

Our practice acts also left the action of replevin unchanged; the proceedings and pleadings being hardly capable of improvement. The taking of property and delivering it to the plaintiff *pendente lite* requires of necessity more machinery than an action for damages. But we had preserved the old common law actions of assumpsit, covenant, debt, trespass, trespass on the case and trover—including the same forms of declarations. We had abolished the whole system of special pleadings, and required a plea of the general issue with specifications of defence. This left us with distinctions in the forms of actions which were merely technical, and of no practical value, but which sometimes defeated the ends of justice, and often entangled cases in nets of form, and caused great delays and expense.

It was often difficult for skilled pleaders to determine whether to bring trespass or case, covenant, debt, or assumpsit, and it often happened that some fact, unknown to the client, and not ascertained or observed till after the action was brought, would require a change in the form of his action, while it did not in the slightest degree affect the merits of the controversy.

In pleading, the general issue was often an absurdity and a falsehood. If a man was sued on a note, and defended because he had paid it, the law required him to deny that he ever made it. This is a fair specimen of the system, and it tended to bring the law into contempt. A change was therefore adopted.

In making the change, the various systems existing elsewhere were examined and discussed. The systems of Admiralty and Chancery pleadings and proceedings were especially considered; but they were rejected as not being adapted to common law actions, and especially to trials by jury. To adopt them would be to obliterate every highway and landmark in common law proceedings, and it was believed that their loose and general systems of allegations would lead to interminable litigation about mere pleading and procedure. The sole object of pleading is to enable parties to try the merits of the questions between them intelligently, without being distracted by irrelevant matter, or being put to expense or delay by unnecessary formalities. Starting on this principle, it was believed that there could be no better basis of pleading than the common law system. In respect to the forms of action, a suggestion was adopted which Mr. Long had made to the English Commissioners, when they were about revising their system of pleadings, which was, in substance, that there was no necessity for retaining more than two separate forms of action. Our personal actions are accordingly divided into two classes. (1.) *Actions of Contract.* These include the former actions of assumpsit, covenant, and debt, except for penalties. (2.) *Actions of tort.* These include trespass, trespass on the case, trover, and actions for penalties.

Having thus simplified the forms of action, the statute proceeds to simplify the forms of declarations. It dispenses with all averments that the law does not require to be proved, such as averments of time and place, which were formerly necessary, though not according to the fact, and averments of loss and finding in trover. Under this system a pleader has very little to do in framing an ordinary declaration. Taking a blank writ, such as we have always used, signed by the clerk of the court,

he has to write only two or three lines besides the names of the parties.

"And the plaintiff says the defendant converted to his own use a horse, the property of the plaintiff," are the words which constitute a declaration in trover. They state everything that the defendant or the court needs to know. The formal *ad damnum* states the amount of damage claimed.

"And the plaintiff says the defendant owes him —— dollars for work done by the plaintiff for the defendant," is the count for work, labor, and service. A count on a policy of insurance hardly requires a dozen lines, yet it states all that is necessary.

The system of answers is equally brief and plain. The answer must deny, in clear and express terms, every substantive fact intended to be denied, in each count of the declaration, separately, or shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny, but leaves the plaintiff to prove the same. A few forms of declarations and answers are annexed to the act. Some of the forms of answers ought to have been changed in 1852, in conformity with the changes made in the act. For example, the distinction between personal knowledge and information and belief, has no significance under the present act, though it had under the first act. There is also needed a greater variety of forms of answers for the guidance of the profession, some members of the bar having notions of pleading that are extremely loose. The knowledge of the principles of pleading is as important under our present system as it ever was; for all cases at common law must be tried in substantial conformity with those principles, whatever forms of pleading may be adopted.

If, therefore, a lawyer would understand accurately the principles by which his case must be determined, he must be acquainted with the principles of common law pleadings. This must be true in New York as well as here. It is true wherever the system of the common law prevails.

But the study of our formalities costs a student very little time, and he needs but very little legal knowledge to enable him to make a declaration in a common action.

We have also answers in abatement and demurrers.

Let us now turn to the practical result of our system; for it has been tested by experiment nearly as long as the New York system.

Opening our books of reports, we shall hardly find a hundred cases in which any of the provisions of the practice act have been discussed. Questions of pleading or practice occupy

very little of the time of our courts; they occasion very little expense or delay; they are decided at *nisi prius* in term time, for we have no chamber practice with its everlasting vexations, and decisions of the presiding judge are commonly acquiesced in. Our courts, and the parties and counsel who come before them, devote their time and strength almost exclusively to the merits of their cases, troubling themselves very little about matters of pleading or practice after the answer is once filed. If errors are made, they are generally amended by agreement of counsel, there being no motive left by the act for wrangling about mere technicalities.

At the same time, parties are fully informed by the record as to all that it is necessary for them to know, and come to trial knowing what the proper issues are. And our records are made with all necessary exactness, setting forth every material fact with clearness, though with brevity. They answer every useful purpose which written records are designed to answer in a lawsuit.

One of the provisions of the practice act requires a defendant to make oath that he believes he has a defence to the merits of the case, and that he intends to bring the cause to trial. Suits that are brought for the collection of debts, as to which there is no defence, are thus defaulted at the first term, and the collection of debts by the process of law is so speedy, that most of such suits are settled before entry in court, either by payment, compromise, or insolvency. Our dockets are not encumbered by this class of cases, standing there for delay.

Litigated cases in the Superior Court are usually tried at the second term; and if questions of law are reserved for the Supreme Judicial Court, they are now finished, on an average, within a year, unless where new trials are granted. Many cases that are thoroughly litigated, are closed by final judgment within six or eight months.

Since the adoption of the practice act, full equity jurisdiction has been conferred on the Supreme Judicial Court, and we have a large and increasing equity practice. But the pleadings have been abbreviated and simplified, and the practice has been so modified that there is no greater delay, and but a little more complication in an equity suit, than in an action at law.

One feature of our system has always been, that taxable costs shall be small. Large taxable costs tempt attorneys to create delays, and tend to multiply a class of lawyers that subsist on taxable costs; and it is a very undesirable class — not con-

tributing to elevate the reputation of the profession or of the courts.

On the whole, our system, while it has some imperfections, is, as we think, very excellent. It has not the exactness of the English system; but the system of special pleading has proved to be a pratical failure, and even as it is amended in England, it is unsatisfactory; and the English practice is enormously expensive. But our system, while it is cheap, expeditious and simple, yet has its basis in the science of the common law, and the pleadings create proper issues for the jury. They keep the domains of law and fact properly separated.

The test by which all judicial systems and systems of pleading and practice should be tried, is to be found, as we have already remarked, by considering what courts, pleading, and practice are designed for. Their purpose is easily stated. It is the duty of every government to provide suitable tribunals, which shall settle, according to general principles, the disputes that may arise between private individuals, and to administer justice between them according to these principles. Where courts are provided, the pleadings and practice are to be regarded as mere methods of obtaining a fair trial and decision. There is a certain degree of exactness necessary in these proceedings; but where enough is obtained to answer all practical purposes, further formalities are injurious to parties, and to the public. Some expense, litigation, and delay are incident to these formalities, but both public and private interests require that they should be as little as possible. In view of the actual purposes which systems of procedure are designed to serve, we think our system is incomparably superior to that of New York.

THE CHARACTER AND EFFECT OF A TITLE TO LANDS GAINED UNDER STATUTES OF LIMITATION.

STATUTES OF LIMITATION are instruments of public policy intended to quiet titles and yield repose. At an early day it was held that the Statutes of Limitation in regard to real estate merely barred the remedy, but did not bind the estate or transfer the title. But at a later period, and now, both in England and America, it is almost universally conceded that the proper and mere operation of these statutes is to give to the disseisor or adverse possessor an absolute title in fee simple, as against

all the world, if he is suffered to remain in undisturbed possession of the estate, during the time expressed in them. 1 Cruise by Greenleaf, Tit. 1, Estates in Fee, § 34, note. 2 Smith Lead. Cas. (5th Am. ed.) 560, American note. In *Taylor* v. *Horde*, 1 Burr. 119, Lord Mansfield said, "twenty years adverse possession is a positive title to the defendant" [in ejectment]. At an earlier day it was ruled by Lord Holt, that "if A. has possession of lands for twenty years, without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession for twenty years is like a descent, which tolls the entry and gives a right of *possession*." *Stokes* v. *Berry*, 2 Salk. 421.

At the time of these decisions, however, another remedy still remained, by an action *on the right*, called a *droitural action*. This was the ultimate resort of the person disseised; and if he failed to bring his writ of right within the sixty years under the stat. of 32 Henry VIII c. 2, he was remediless, and the title of the possessor was complete. Upon this Blackstone remarks, "So that the possession of lands in fee simple uninterruptedly, for three score years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever." 3 Black. Comm. 196. But the writ of right no longer remains. By statute 3 & 4 Wm. IV. c. 27, one period of limitation, twenty years, is established in England for all lands and rents. This act abolished all real and mixed actions of every description except a writ of dower, *quare impedit*, and an ejectment. By this act also, the right and title of the person, whose remedy to recover the land is taken away, are extinguished. The time of limitation in this country varies in the several States; in most of the States twenty years is the period established; in some it is more, and in others less than that time; but the effect upon the title of a failure to adopt the remedy within the time prescribed, so far as it depends upon the application of the principles of the common law to the construction of the statutes, is very much the same in this country as in England.

In School District No. 4, in *Winthrop* v. *Benson*, 31 Maine, 384, 385, the Supreme Court of Maine held, that "a legal title is equally valid when once acquired; whether it be by a disseisin or by deed, it vests the fee simple, although the modes of proof, when adduced to establish it, may differ. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by

the existence of the facts, and not by the exhibition of them in evidence. An open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs," [those holding the adverse possession] "as much so as any written conveyance. And such title is not only an interest in the land, but it is of the highest character; the absolute dominion over it, and the appropriate mode of conveying it, is by deed." Such title can be transferred only by deed. It can no more be abandoned or transferred by parol than any other undisputed title. This strong and clear statement of the law, gives to the Statutes of Limitation their obvious and legitimate effect. The cases of *Armstrong* v. *Risteau*, 5 Maryland, 256, and *Blair* v. *Smith*, 16 Missouri, 273, discuss the subject and draw the same conclusions. In *Sumner* v. *Child*, 2 Conn. 619, Swift C. J. said, "The statute barring entry on lands by fifteen years adverse possession, has been construed to transfer the estate." See 2 Washb. R. Prop. 492; *Steel* v. *Johnson*, 4 Allen, 425.

There are numerous other cases in which the same view is adopted without question.

The title by possession, continued during twenty years, has been considered so perfect under the English Statute, that unwilling purchasers have been compelled to accept it, in suits for specific performance, though depending upon parol evidence. See *Scott* v. *Nixon*, 3 Dru. & War. 388; 1 Sugden, Vend. & Purch. (7th Am. ed.) 589; Dart. Vend. & Purch. (Am. ed. 1851) 198, 199.

In computing the time to make up the period of limitation, the possessions of several persons holding successively may be tacked together, if one comes in under the other, and the possessory estates are connected and continuous.

But unless there is some privity or connection—such as that of ancestor and heir, devisor and devisee, or grantor and grantee,—between the successive possessors, the seisin of the true owner revives and is revested, and a new distinct possession or disseisin is commenced by each successive possessor. *Sawyer* v. *Kendall*, 10 Cushing, 244, 245. *Carter* v. *Barnard*, 13 Q. B. 945. And it is equally true, that even where there is such privity, the disseisin is abandoned, and the legal seisin of the true owner is restored, unless the heir, devisee or grantee, actually enters, and continues the adverse possession. After abandonment no tacking can be effected. *Melvin* v. *Proprietors &c.* 5 Metcalf, 32; 2 Smith Lead. Cas. (5th Am. ed.) 562; 2 Wash. R. Prop. 487, 490. *Winslow* v. *Newell*, 19 Vermont

169. *Potts* v. *Gilbert*, 3 Wash. C. C. 475, 479. Angell Lim. (3d ed.) § 413. *Moore* v. *Small*, 9 Barr, 194. So the privity is of no avail without the continued possession, and the continued possession of successive possessors is of no avail without the requisite privity or connection.

The character of the interest, which passes from one disseisor to another, where the privity exists, is not very clearly defined. It certainly is not the *title to the estate*, because that is not acquired until the successive disseisors have held possession during the period of limitation. *Chilton* v. *Wilson*, 9 Humph. 399, 404, 405. *That title* cannot have passed from one of the disseisors to the other. "The disseisor by his disseisin gains "*a mere naked possession*," 2 Blackstone Comm. 198, a mere imperfect right, *jus vagum*, until it is protected by the Statutes of Limitation. *Moore* v. *Small*, 9 Barr, 196. In *Overfield* v. *Christie*, 7 Serg. & R. 177, Tilghman C. J. said, "I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires *something which he may transfer to another;* and if the possession of the two added together amounts to twenty-one years and was *adverse to him who had the legal title*, the Act of Limitation will be a bar to his recovery." This was agreed to with some qualification by Burnside J. in *Moore* v. *Small*, 9 Barr, 194, 196. The main constituent element of the disseisor's interest is the actual, though *mere naked possession*. Unlike a perfect title, which may be held by the heir, devisee or grantee, whether he enters and occupies or not, this imperfect interest, this *jus vagum*, can be maintained only by the party actually entering and becoming a disseisor—a wrong doer on his own account. The descent, devise or transfer only creates a connection of the possessions. The privity is between wrong doers—because each disseisor is a trespasser and wrong doer; and each possessor must do his part as a wrong doer, towards maintaining the possession and thereby gaining the title under the statute. Besides the actual possession, the only thing gained by the transfer is—not the *right* of possession or the *right* of property,—but the mere right to tack the time of the possession of the former disseisor to that of the latter, and thus make out the statute period; but this privity is not the *estate*, or the true title to the estate; it is only one of the means of acquiring the title; actual possession is the other. As soon as the true title passes, the disseisin terminates. To gain the title under the Statutes of Limitation, it is said, "No more is necessary than that it [the adverse possession] be not broken during the period; and for the purpose of tacking, conveyances between successive occu-

pants operate to hinder it from falling back, in contemplation of law, through those real or imaginary intervals that would otherwise occur betwixt the relinquishment of the one and the entry of the other." *Parker* v. *Southwick*, 6 Watts, 378.

The whole effect of the transfer is, then, to connect the possessions, and thereby give the right to tack the former to the latter—not to connect *titles*, because the case assumes that the predecessor does not hold the *title*. If he did hold it, the successor would not be a disseisor at all, but the real owner, and there would be no case for tacking. In another decision, it is said that "an actual possession is one of the constituent elements of a perfect title to land, and may exist independent of the right in one, who has neither the right of possession nor the right of property, and therefore may be transferred by him who has it to another who takes it after him and continues it; so that if the possessions of the two added together will amount to twenty-one years, it will be a bar against the owner, if it has been adverse to him." *Mercer* v. *Watson*, 1 Watts, 338. See 2 Black. Comm. 198. In cases not dependent on descent or devise, it seems, from some decisions, that a *deed* is not necessary to transfer the possession and make the connection. "The fifteen years possession necessary to give title must be under the *connected claim* of title, although it may be by various persons, and may pass from one to the other by *parol merely*; still it must *be connected*." Redfield J. in *Winslow* v. *Newell*, 19 Vermont, 169. See also *Cunningham* v. *Patton*, 6 Barr, 355. The interest in real estate that may pass by parol must be very imperfect. But for the purposes of this discussion, it is sufficient that, beyond controversy, it is not the *true title* to the estate that passes, and therefore the privity between the successive disseisors is not a privity or derivative interest passing from one to the other, in *that title;* and one can never be said to hold the *true title* under the other, and neither has it, until the statute period has expired. The word "title" is here used in the sense of it given by Blackstone; viz., "the means whereby the owner of lands has a just possession of his property." 2 Comm. 195.

Considerable confusion sometimes arises from the fact that the phrase "title by disseisin" is frequently employed in two different senses, one expressing that imperfect right on interest, which the disseisor acquires by the mere act of disseisin, and which is liable at any time, and in various modes, to be defeated; and the other expressing that perfect and indefeasible title in fee simple which is acquired under the Statutes of Limitation by a continuance of an adverse possession, which is one of the

elements of disseisin, during the statute period. These two kinds of title are entirely different in every respect but name, and have no natural or legal relation to each other. They are confounded by the mere use of terms. The phrase will be used in this discussion in the former sense.

The next points for consideration regard the time when, the manner in which, and the person to whom, in cases of successive disseisins, the title is transferred. In the *Incorporated Irish Society* v. *Richards*, 4 Irish Eq. Rep. 177, 197; s. c. 1 Dru. & War. 258, Lord Chancellor Sugden, since the passing of the act of 3 & 4 William IV., c. 27, in the course of his decision, remarked, that "possession for twenty years after the right of the real owner has accrued, without acknowledgment of title, gives both the land and the right to it, and *the title is transferred at the time when the remedy is barred*, and every scintilla of right is lost to the former owner, unless the case is brought within one of the exceptions in the statute." "Under the new act, possession gives the right, and not only gives the right, but transfers the estate;" "in point of fact, gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate." The same view was taken of this act by Parke B. with the concurrence of the Court of Exchequer, in *Jukes* v. *Sumner*, 14 Mees. & W. 39. "The effect of the act," he said, "is to make a *parliamentary conveyance* of the land to the person in possession after that period of twenty years has elapsed." See 2 Crabb Real Prop. § 2381. Gibson C. J. in *Parker* v. *Southwick*, said, "the effect of the statute is to transfer *the title lost*, and not to confirm a title gained." The title in the true owner is not lost, but may still be made effectual to him at any time before the statute period has expired. No title is gained by the adverse possessor until that time, and, of course, until that time there is no title in him to be confirmed. But when that period has elapsed, the title of the person, whose remedy is then lost, is extinguished. But the title must reside somewhere—it goes to the person then in possession—not by way of confirming any former *title*, defective, imperfect, or otherwise, but by way of a new statutory conveyance. See 14 Mees. & W. 39; 3 Dru. & War. 405, 407. The previous rights and interests of the successive disseisors, whatever they may be, all become merged in the perfect title thus acquired. The privity of *title* does not run back through the successive disseisors to the disseisee; and there is no privity of *title* between the successive disseisors themselves, because the *title* resides in the disseisee until the period of limitation has elapsed, and could

not be at the same time in any of the disseisors. The only privity *of title* that exists must be between the person who has lost the title and the last possessor to whom it is transferred. The statute acting on the circumstances makes the conveyance and creates the privity, so far as necessary to the perfect enjoyment of the acquisition. See per Bigelow J. in *Brewer* v. *Dyer*, 7 Cushing, 340. Goodenow J. in *Stimpson* v. *Monmouth, Mut. Fire Ins. Co.* 47 Maine, 383. There are many cases where lands are transferred by authority of law, in which no other kind of privity than the above is created between the purchaser and the former owner; as in cases of sales of land for taxes, or levies under executions, which are called by Shaw C. J. "a species of statute conveyance." *Blanchard* v. *Brooks*, 12 Pick. 65.

"The title is vested by the existence of the facts." He that has "kept the flag flying to the end" has the benefit of them. His position is the only one to which the statute is applicable.

In cases of title acquired under Statutes of Limitation, there is no room for the presumption of lost deeds or grants. The transfer of the title, is a conclusion of the law applied to the facts. The circumstances of the case repel the presumption of any deed other than the statutory conveyance. *Res ipsa loquitur.*

The rules of law established in reference to the presumption of lost deeds or grants, relate to an entirely different class of cases—cases not affected by Statutes of Limitation. See *McLeod* v. *Rogers*, 2 Richardson (So. C.), 19, 23.

The reason of this difference, as it is stated by Mr. Greenleaf, is, that in cases where the statute applies, it has made all the provisions which the law deems necessary for quieting possessions; and has thereby taken these cases out of the operation of the common law. 1 Greenl. Ev. § 17.

In *Sumner* v. *Child*, 2 Conn. 614, Swift C. J. said: "It is peculiarly in cases where there is no Statute of Limitation, that the doctrine of presumption comes into operation. Lord Mansfield says, there are many cases not within the statute, where, from a principle of quieting possession, the court have thought the jury should presume anything, to support a length of possession. Whenever there is a Sttaute of Limitation, it is conclusive on the jury as a bar. Cowper, 108." The Supreme Court of Vermont discussed this subject at great length, and with singular ability and force, in an opinion delivered by Mr. Justice Aldis, in the case of *Townsend* v. *Downer*, 32 Vermont, 183, 204, *et seq.* The court there say: "In cases *within the Statute of Limitation*, mere length of possession, unaccompanied

by other circumstances, is not sufficient to raise the presumption of a grant. Where possession has existed for the length of time prescribed by the statute, it becomes a bar by the operation of the statute." See 2 Crabb Real Prop. §§ 2381, 2382. In such cases the statutory title is sufficient.

But if a grant is to be presumed, it can only be one growing out of the circumstances, and on the circumstances it could be presumed to have been made only when the facts show that, by the statute, the title was lost to the true owner. To assume an earlier date would be a fiction too bald and gratuitous to be admitted into the society of respectable and enduring principles of law. The case supposes a disseisin by one party, and a retention of the true title by the other (the disseisee), during the whole period of limitation. The origin of the possession is known, and it is also known that no deed in fact was given. Grants are presumed in cases of ancient or long continued possession, in analogy to the statute, *where* the statute does not apply, and *because* the statute does not apply, for the purpose of quieting titles, where there is no other mode provided. But in cases where the statute applies, the presumption of a lost deed would become a work of supererogation. No deed is necessary. The title depends upon the absolute and conclusive bar of the statute, and upon the parliamentary or statutory conveyance growing out of the effect of it. The rule stated by Mr. Justice Aldis, in *Townsend* v. *Downer*, 32 Vermont, 208, excludes the presumption of a lost deed in cases where, and at a time when, the circumstances repel it. "It may be stated," says he, "that the entire current of authority shows that deeds and grants of lands may be shown by presumptive evidence as well as any other, where there has been a possession corresponding to the grant, and *where auxiliary circumstances exist, making it reasonable to believe that such deed or grant has in fact been made, and where the circumstances are not equally consistent with the non-existence of a grant.*" See *Beal* v. *Lynn*, 6 Harr. & John. 361, per Archer J. This rule, if acted upon, would relieve juries from straining their oaths and their consciences to find lost grants, which they know never existed. In *Chilton* v. *Wilson*, 9 Humph. 399, 405, the court said, "Time works out for the party a title, and it is never complete until the expiration of twenty years, when it vests in the party then in possession."

These principles may be illustrated by supposing cases that might actually happen in practice.

A, the owner of an estate worth $5000, is disseised by B, who holds by adverse possession, say, five years, and then, having made no improvements, by deed of quit claim, which is duly recorded, conveys to C all his right, title, and interest, in the premises. (We take a quit claim deed because a warranty would raise distinct questions.) Let that which B sells be called his "title by disseisin." It is the "bare, naked possession" held by the strong hand—having no respect to time—but as good the first moment taken as ten years after that; clearly an imperfect and precarious right, if right it may be called at all. It is certain that C, the purchaser, if he entered, might be, and highly probable that he would be, turned out of possession by A, the real owner, and compelled to pay a bill of costs, if he defended, as soon as an action could be brought to a termination. The infirmity of the title being so certain, and the chances of holding so uncertain, the price, according to any fair calculation, upon the facts being known, would be proportionately reduced. If any one should give more than a twentieth part of the actual value, he would go beyond the market value of the interest sold. Suppose, then, C, the purchaser, pays $250, or even $500 for his purchase, and for some reasons, either because he does not wish to hazard a lawsuit, or to hold by wrong, as a disseisor must, he does not enter into possession, but B keeps up his disseisin, as before, both against A, the original disseisee, and C, the purchaser; and at the end, say, of ten years, sells to D, who enters and continues to hold the adverse possession, until the period of limitation, as against A has expired. D has thereby acquired the true title in fee simple to the estate—a statutory conveyance—as good a title as if he had a deed. If A, after this, should bring an action to recover the estate against D, the latter would plead the Statute Bar and be decreed the owner. The question then arises whether C, who purchased only an imperfect and precarious title for $500—all it was worth—can now come in under his deed, claim and hold the whole estate, worth $5000, upon the new title by which it has been acquired by D under the Statute of Limitation; or shall D be permitted to hold and defend under his new title thus obtained? It seems to us, in the first place, that D would not, upon well settled principles, be estopped to set up his subsequently acquired title against C, and, in the next place, that it would not be presumed, against the acknowledged fact, that B had a good title by deed when he first entered.

Upon the point of *estoppel* in such a case, the opinion given by Mr. Justice Wilde, in *Comstock* v. *Smith*, 13 Pick. 116,

is full of instruction. This case was a writ of entry. The tenant holding a parcel of real estate by disseisin, conveyed his "title by disseisin" to the demandant, by a quit-claim deed, with warranty "against the claims and demands of all persons claiming by or under him." But the tenant continued in possession of the estate, and afterwards purchased and took a deed of the same in fee from the person disseised. The demandant claimed, that the tenant was estopped to set up a title under his deed from the disseisee, because it would impair his own previous grant of the "title by disseisin." But the court regarded this "title by disseisin" conveyed by the tenant, and the paramount title, afterwards acquired by him of the disseisee, *as entirely distinct titles;* and decided that the tenant might set up and hold under the latter, against the demandant, to whom he had previously conveyed the former; in other words, might defeat his own grant of the "title by dissesin," by obtaining the paramount title of the disseisee. Wilde J. said:—"The tenant, at the time of his conveyance, might have had a valuable *interest* in the land by possession and improvements; although Waters [the disseisee] had a paramount title. This *interest*, *whatever it was*, passed to the demandant by the tenant's deed, and it was all the title he had to convey, or was expected to convey. If, "*under these circumstances, the demandants could now acquire, without any consideration, another title by estoppel, we should be compelled to admit that estoppels are as odious as they are sometimes said to be.*" If this case is law, and no one doubts it, the only remaining question would be, whether there is any difference in the force, operation and effect of the paramount title when obtained by deed, and when obtained by the statute conveyance under the Act of Limitation. That there is no such difference is very clearly shown by the cases of School District No. 4, in *Winthrop* v. *Benson*, 31 Maine, 381; *Armstrong* v. *Risteau*, 5 Maryland, 256; *Scott* v. *Nixon*, 3 Dru. & War. 388; *Jukes* v. *Sumner*, 14 Mees. & W. 39; *Incorporated Irish Society* v. *Richards*, 4 Irish Eq. Rep. 177, 197; and *Scott* v. *Nixon*, 3 Dru. & War. 405, cited above. If there is no such difference, it may well be asked, what would be the consideration on which C, in the case above supposed, having bought only the "title by disseisin," would also, and by the same conveyance, obtain the paramount title acquired by D's continued adverse possession?

Upon the point of presumption of a lost deed, and that the entry of B by disseisin, in the case above supposed, was in fact under a good title, if any one should seriously make it, it is

very obvious to observe, that the effect of such a naked and gratuitous fiction, besides doing violence to all the facts, would be, to give to C what he never bought—never did anything to gain—and never paid any consideration for; viz., the paramount title, when he bought only the imperfect "title by disseisin," and at the same time takes from D the title which the statute gave him.

In the next place, it may be argued that C and D both claim under B; and C, having the elder deed, ought to prevail. Herein is the fallacy of the adverse argument, which is fully answered by the case of *Comstock* v. *Smith*. It is very true, that both C and D do hold under B what we have called "the title by disseisin," "the mere naked possession," which is regardless of time, and as good at the first moment as at a later one; but the perfect title, the statute conveyance, which is the mere creature of time, and accrues only at the last moment of the period of limitation, neither of them ever held under B, because B never had it. D gains this by virtue of his possession at the time when it accrued; being in a position to receive the statute conveyance, he becomes clothed with the paramount title by force of it. This title was never in fact or in law held by C, under any one, and he obtains it, if at all, only by the force of an odious estoppel or by a fictitious presumption, contrary to the fact, of a lost deed; both of which modes have been considered above. It should be observed that, under the authority of *Comstock* v. *Smith*, D does not claim that nothing passed by B's deed to C. On the contrary, he admits that B's "title by disseisin" did pass to C, and that satisfies his deed. But, he says, that there was at the same time an outstanding paramount title in A, superior to that of B, and that D afterwards, under the Statute of Limitation, acquired that title by the statute conveyance, and now relies upon it as a good and valid title. *Doane* v. *Wilcutt*, 5 Gray, 333. In *Stearns* v. *Hendersass*, 9 Cushing, 497, it appeared that Stearns derived title through several *mesne* conveyances from Hendersass, but that Hendersass had continued to hold the estate adversely to his grantee and those claiming under him for twenty years, and it was held that he was not estopped to set up his subsequently acquired title under the Statute of Limitation against his own grant. The reasons are clearly stated in a very able opinion by Mr. Justice Dewey.

But suppose D, instead of gaining the paramount or true title under the Statute of Limitation, had acquired it by a *voluntary* conveyance from A, the true owner; in that case he

could set it up against C, the purchaser from B, notwithstanding the deed from B to C. *Comstock* v. *Smith*, 13 Pick. 116; *Blanchard* v. *Brooks*, 12 Pick. 47; Rawle Cov. for Title (3d ed. 409). Now, why should C lose his interest or title any more in the case of the voluntary conveyance by A to D, than in the case of D's acquisition of the paramount title under the statute. The equities are the same. The truth is, C obtains all he bought in either case. He buys an estate liable to be taken from him at any moment, under various contingencies; one of those contingencies happens, and he loses the estate. He has nothing to complain of. If there is to be a presumption against the fact that B had the title from the beginning, so as to protect C in his purchase, in the case of the title acquired under the statute, why not also in the case of the voluntary conveyance? There would be no more fiction in saying, that the title D might take under the voluntary conveyance from A, was conferred upon him twenty years before it was, than in saying that the title, acquired under the statute, was gained twenty years earlier than it was. One fiction is just as good and reasonable as another, where the ground for them and the equities are the same. It may be submitted, that it is dangerous to resort to false assumptions or presumptions at any time. Every truth in the universe agrees with every other truth in the universe; while falsehood is not only inconsistent with everything else, but with itself also. A clearly false presumption introduced into the law will make a strain on the system somewhere, and must be worked out again. As we have intimated before, the presumption in this case, where it is known to be false, is very different from that made in cases where the statute does not apply. There it is made on the ground that, on all the probabilities, the fact presumed is true; i. e., that the deed was given, or conveyance made when it is presumed to have been made.

The case we started with is a *disseisin*—a wrongful act—a known invasion of the true owner's rights. A presumption, then, that the disseisor held under a deed from the true owner, would lead to the conclusion that there never had been any disseisin, which would be contrary to the fact started with. In cases not under the statute, the presumption is made because it is not inconsistent with the facts, but is a probable inference from them. See *Townsend* v. *Downer*, 32 Vermont, 183. *Beal* v. *Lynn*, 6 Harr. & John. 361. "A deed, or other mode of conveyance, may be presumed from long possession and *other circumstances, which can be accounted for only on the*

assumption of a conveyance." Morton J. in *White* v. *Loring*, 24 Pick. 319; *Valentine* v. *Piper*, 22 Pick. 93; *Melvin* v. *Locks & Canals*, 17 Pick. 261, 262. In the case of disseisin, the facts cannot be accounted for on the presumption that there *was* a deed.

But suppose that C, in the case assumed, should recover of D, then A, the true owner, might in turn bring an action for the estate against C, who would have no means of defence *under the title or right conveyed to him by B.* Could C defend, on the ground that D had subsequently acquired a title under the Statute of Limitation? That is the very ground on which we claim that D should never have been disturbed. Why should C have the advantage of defending under a title he never had, or helped to gain? If C could not defend against A, and A should recover against him, then D might enter on A, and get back where he started from, on the ground that as against A, D has a perfect title. So strange a result would show something wrong in the recovery by C against D. Other cases likely to happen might be suggested.

Suppose a disseisor of an estate worth $5000, as before assumed, should die insolvent, after he had been in possession for fifteen years, and his heir should enter and continue the possession, and in due course of administration, the administrator should sell the interest of the intestate in the estate, for the payment of debts, and the title being imperfect, doubtful, and precarious, no one wishing to hazard a suit by the true owner, or to become the wrongful holder of an estate, the property should sell for a small sum, say $500, and the purchaser, for the same reason, should fail to enter, until he thinks to do it safely after the period of limitation has expired, and the heir, by holding the estate, has gained the title through the statute conveyance; might the purchaser, who had bought the imperfect title, then come in, and take the perfect, the paramount, the *different* title gained by the heir, under the statute, to an estate worth $5000, for the $500 paid, without having paid any other consideration, or moved his hand in the way of acquiring that title? If so, would it be effected by way of estoppel of the heir? Then estoppels must be admitted to be "as odious as they are sometimes said to be." Would it be by presumption? A presumption tending to such a result would be quite as odious as fictitious.

It will be observed here that it is not the creditors, for whom there might be some solicitude, that would gain the advantage, but the speculating purchaser. If it is asked why should the

heir have the advantage of gaining the estate? the easy answer would be, because he is in a condition to take it under the statute; no answer so valid or reasonable could be given by the purchaser to that question.

But suppose, instead of the heir taking and holding the estate, the disseisor had devised it, say to his widow, who enters and continues the adverse possession until the period of limitation is determined; and believing the estate to be solvent, has not waived the will, but has in consequence lost her right to dower. This would present a case of strong equity in favor of the widow.

A case might occur where the insolvent, deceased, held only a mere imperfect right or "title by disseisin," at his decease, and the sale by an executor or administrator is not made until after the period of limitation has expired, and the true title has become vested in the heir or devisee, whichever has entered and continued the adverse possession. But all of these instances depend upon the same principles. The inferior title must yield to that which is paramount, in whosesoever hands it may be. The person in adverse possession when the period of limitation expires, and the title of the true owner (the disseisee) is extinguished, receives the statutory or parliamentary conveyanee, and becomes clothed with the paramount title by force of it. This he is not estopped to maintain against one who claims only a possessory title to the premises, or a mere "title by disseisin," according to the sense of that phrase as employed in this discussion. It is of no consequence who sets up this possessory title, or from whom it may have been derived. The strongest case that could well be made against the right of a party to set up the paramount title is that presented in *Comstock* v. *Smith*, above cited, where the holder of it was allowed to set it up agains *his own previous grant*.

There is no relation between the creditors of an insolvent estate and the heir or devisee, which will permit the former, holding only the inferior title, to prevail over the latter, armed with the superior or predominant title.

It should be observed all the time that the period of limitation is fixed by a stern rule of positive law, which must be followed and not evaded. It cannot be turned to meet cases of supposed hardship or inconsistency, without doing violence to its provisions and purposes. The effect, either constructive or positive of the statute, is to extinguish the title in the true owner and to transfer it to the person, having the requisite privity, in possession when that extinguishment takes place. It

can of course be transferred to no other person. That person, whether heir, devisee or grantee, thereby obtains, under the statute, the conveyance of the paramount title, which, before the period of limitation expired, was in the disseisee. Such is the effect of the positive rule, and the title must be left where the statute leaves it.

Grant that the result of this would be to prevent the creditors of the insolvent estate of the original disseisor from availing themselves of his title or interest by disseisin, at the time of his death; is not that the result in any case, where the inferior right or interest of a person in real estate upon which third parties rely, is overcome and defeated by the paramount title? But why should this be complained of any more than the severe effect of the statute to entirely deprive the former owner of his estate, and the creditors of the former owner, if insolvent, of their expectations? After the imperfect "title by disseisin," held by the disseisor, has been defeated by the paramount title devolving upon the last possessor, it would be equally vain and absurd, upon any sort of principle, to undertake to resuscitate it for the benefit of anybody. It no longer exists for any purpose. There are many other cases where parties are defeated of their expectations quite as rationally entertained. But that has never been considered a reason why other parties should be deprived of rights the law confers upon them. A creditor attaches a valuable equity of redemption in an estate in possession of the mortgagee for foreclosure, and the foreclosure takes place before the creditor can avail himself of it; or he attaches the estate of a disseisee, and the Statute of Limitation takes away the title before the attachment can be perfected; or he levies an execution on a life estate, and the tenant for life dies immediately; those persons on whom the law confers rights adverse to the creditor do him no wrong by exercising those rights.

Grant that another result, of the principles contended for here, may be to transfer to the heir, devisee, or grantee, an estate for which they may have paid nothing; is not that the case in every acquisition of title by a disseisor who continues his possession during the statute period? But is it a reason why the inferior should prevail over the paramount title—the mere imperfect, precarious title of the disseisor over the statute conveyance or transfer from the true owner?

The heir or devisee does not hold the real estate of an insolvent testator or intestate in trust for the creditors. He holds as owner; and whatever advantage he obtains either by the use of the estate or by the operation of any positive rule of law, is

for his own benefit. This is well illustrated by the case of *Boynton* v. *Peterborough & Shirley R. R. Co.* 4 Cushing, 467. In that case, where the land of a deceased person, intestate in the hands of his heir, had been taken for a railroad, the heir was held entitled to the damages, although the estate was insolvent, and the administrator afterwards obtained license to sell the intestate's real estate for the payment of his debts. Shaw C. J. said, "the heir takes the estate according to the well known rule of inheritance, at the time of the decease of the ancestor." "All the legal consequences of this relation are held to follow. The heir is the owner till he is divested; he has the exclusive possession and right of possession; he may take the rents and profits to his own use, and without account; and being at law seized and possessed of the estate taken for the railroad, at the time of the taking, the Court are of opinion that the heir was the owner within the meaning of the statute, and entitled to the damages to be recovered of the railroad company for such land, and of course that the administrator was not so entitled." This was not a case of disseisin, but it is so much the stronger for the argument; for if the heir could derive such benefit from the estate, the *title* to which was in the ancestor, and to which the creditors had in consequence a clear right to resort, how much greater should be the advantage to the heir, where the *title* and the estate was *not* in the ancestor, and did not belong to the creditors, except as an imperfect right, liable to be defeated by any person having the paramount title? The main point of this discussion is somewhat new. We may have occasion to advert to it again hereafter.

RECENT AMERICAN DECISIONS.

United States District Court, Western Pennsylvania.

UNITED STATES *v.* MONONGAHELA BRIDGE COMPANY.

Act of Congress of 17th July, 1863, construed.

Bridge, Railroad and passenger Railway Companies may issue tickets "good for one trip," without violating the provisions of the Act.

Those tickets are not designed to supplant the circulating medium, but are matters of convenience, equally to the passenger and the companies.

If they bore any resemblance or similitude to the coin of the United States, or the Postage Currency authorized by Congress, or if the purpose, indicated upon their face, was to cause them to circulate as money, the Corporations issuing them would be amenable to the penalties of the Act.

This case, together with the cases of the *United States* v. *The Alleghany Bridge Company, and the Northern Liberties Bridge Company*, was argued by Mr. Bakewell, Mr. Loomis and Judge Shaler for the defendants, and by Mr. U. S. Attorney Carnahan for the Government.

Opinion of the Court by

McCandless, United States District Judge.—The question raised by the demurrer is, whether these corporations are liable to the penalty under the provisions of the act of Congress of the 17th July, 1863, for issuing paper tickets to be received for toll. The indictment charges that the defendants "did issue, circulate, and pay divers checks, memoranda, and obligations, each for a sum less than one dollar, *intended to be received and used in lieu of the lawful money of the United States.*" The tickets are described as having printed on their face, "Monongahela Bridge—good for one trip," with the name of the collector of tolls added. We do not think that this is a violation of the act of Congress. Unlike the tokens recently issued by the merchants of this city, and for which penalties have been imposed by this court, these tickets have no resemblance or similitude in shape, design or material, to the coin of the United States, nor to the Postage Currency, the free and untrammelled circulation of which it was the design of the act to advance and protect. They cannot even be dignified by the name, given in anything but polite phraseology, to the worthless issues of rotten boroughs, which in our past history flooded the country, and against a renewal of which the prohibitions of this act are directed. They do not contain a promise to pay money, they are not the representatives of money, and therefore cannot be said to circulate, or be intended to circulate as money. Money is the medium of exchange among the people. Its peculiar characteristic is, that it is the one thing acceptable to all men, and in exchange for which they will give any commodity they possess. The power to make it is an exclusive attribute of sovereignty, no difference of what material it may be composed. It may be of the precious or the baser metals, or it may be of paper, provided it has the stamp of the sovereign authority. Any infringement of this supreme prerogative is visited with merited punishment by all nations that claim to have organized or well-regulated governments.

What are these tickets, but a mere permit to pass on the defendant's bridge, the printed evidence that the holder has the right of way over a public thoroughfare for a given distance? Their exclusion would [prohibition would] be subject to the penalties of this law all railroad and passenger railway companies which issued tickets, as well for the convenience of the public as for their own protection. No passenger is bound to receive them, nor should they be tendered, except during periods when there is great scarcity of the smaller coin of the United States, and when the exchange is a mutual accommodation to the passenger and the collector; as every passenger is bound to pay his toll, and in the lawful circulating medium the embarrassment is more frequently with him than with the company. But as the latter enjoy a monopoly of the particular highway, it is their duty so to use their franchise as not to put the public to unnecessary inconvenience. The grant of corporate privileges is for the public good; and from our knowledge of the gentlemen having the management of these companies, we are satisfied they entertain no desire to abuse them. They have an interest in common with the community in preserving the purity of the currency, and a departure from this policy would only react on themselves.

Let judgment be entered for the defendants on the demurrer, the costs to be paid by the United States.

Supreme Court of Pennsylvania.[1]

(At Nisi Prius. In Equity.)

KNEEDLER *v.* LANE, *et al.*

SMITH *v.* LANE, *et al.*

NICKELS *v.* LEHMAN, *et al.*

The decision of the Supreme Court heretofore made in these cases, declaring the Act of Congress of March 3, 1863, commonly called the Conscription Law, unconstitutional, now overruled, the Act declared constitutional, and the injunctions then granted dissolved.

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[1] From the Pittsburgh Legal Journal.

The power to grant an injunction to restrain the commission of a merely personal tort doubted.

The rule, that when an application to dissolve a preliminary injunction is made before answer, it must be supported by affidavit on the part of the defendant in answer to those upon which the injunction was obtained, is but a rule of practice for the relief of the court, and not for the protection of complainants.

The rule is applicable only to cases where the facts averred in the bill and special affidavit of the complainants are disputed.

An interlocutory injunction is not demandable, of right, but may be denied, or granted and dissolved at the discretion of the court.

Reasons for hearing the motion to dissolve these injunctions:—they cannot benefit the complainants; the present majority on the bench think the Act of Congress constitutional; the injunctions were granted *ex parte*, and no laches are imputable to the government; they were in character extraordinary and unprecedented; and the records show that the injunctions ordered have never been issued.

Motion to dissolve the preliminary injunction. Opinion of the court by Strong J.

When the motions for preliminary injunctions were made in these cases, and all the Judges of the Supreme Court were invited to hear the argument, and advise what orders should be made, I was of opinion that there was no equity in the complainants' bills, and I advised that the injunctions asked for should be denied. I thought then, as I think now, that the Act of Congress, of March 3, 1863, under which the defendants were acting, is constitutional, and therefore that they had neither done nor proposed to do anything contrary to law or injurious to the complainants. The reasons upon which my opinion was founded, I then reduced to writing, and they are on file in this court. They are not all which I might have given. Upon the power of a State court to enjoin a Federal officer against the performance of a duty imposed upon him by an act of Congress, I refrained from expressing any opinion. I refrain now. Yet I had no doubt then, and I have none now, that these bills do not present a proper case for the interference of a court of equity, by injunction, even if the act of Congress were unconstitutional. The facts charged exhibit no case for the action of a court of equity. No chancellor ever enjoined in such a case, and I think it has never before been supposed that he has any jurisdiction over such a wrong, (if it be a wrong,) as these complainants ask to be restrained. During the whole of the two arguments to which I have listened, one in support of the original motions, and the other against the present motions to dissolve the injunctions, I have heard no reference to an authority for the position that a court of equity has any right to interfere in such a case. I believe no authority of the kind can

be found. Reference has, indeed, been made to our act of assembly of June 16, 1836, which confers upon the court and the several courts of common pleas power to "prevent or restrain the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals;" but until now it has never been supposed that this act extends the preventive power of this court beyond that possessed by any English chancellor. No one has ventured to assert that every civil wrong may be restrained by injunction, and that a judge sitting in equity can enjoin against any act that a common law court and jury can redress. It was jurisdiction and power in equity that the legislature intended to bestow upon our courts, and it has never been seriously claimed that they bestowed more than is possessed and exercised by courts of equity in England and in other States. But when, before these cases, was an injunction ever granted to restrain the commission of a merely personal tort? What chancellor ever asserted he had such power? It was hinted in the argument, that the power must be vested in this court, because the privilege of the writ of *habeas corpus* has been suspended in certain cases. The hint will not bear examination. How can the suspension of the writ of *habeas corpus*, either by Congress or any branch of the Federal Government, enlarge the jurisdiction of this court? Or how can the restoration of this privilege curtail its jurisdiction? The extent of the powers of every court in this State is defined by State law. It is not in the power of Congress to enlarge it, either by direct or indirect action. Besides, if the suspension of the privilege of the writ of *habeas corpus* could confer upon a State court a power to enjoin against an arrest (a power which, without the suspension, it would not possess), then the Constitution of the United States, in authorizing it in cases of rebellion or invasion, when the public safety may require it, has merely converted a *habeas corpus* into an injunction, and substituted a bill of equity for a common law writ. Then the object sought to be accomplished by the constitutional provision has utterly failed. Manifestly, the Constitution contemplates the possible necessity of arrests without the interference of courts in times of rebellion or invasion, and it has provided for such cases by authorizing a denial of the privilege of the writ of *habeas corpus*. But what does this amount to, if the very act of taking away the writ enlarges the power of State courts of equity, and justifies them in interfering to prohibit the arrests. I will not, however, pursue this subject further; I mention it at all only because I would not have it

thought that I admit the power of this court to interfere by injunction, even if the defendants proposed wrongfully to force the complainants into the military service of the United States.

When the injunctions were ordered in these cases, I endeavored to show that the act of Congress of March 3, 1863, is constitutional; that consequently the bills exhibit no wrong done or threatened to be done to the complainants, and that for this reason they have no equity. I have heard nothing since which has raised even a doubt of the correctness of the opinion I then gave. Very much might be added to what I said in vindication of the constitutional power of Congress to enact the law, and in refutation of the objection urged against it; but I should hardly be justified in entering again upon a discussion of that subject before these cases came up for final decrees.

It was strenuously insisted at the argument that the present motions should not be entertained, because the defendants have neither demurred to the bill, nor put in an answer, nor presented affidavits, denying the facts averred, and because the cases stand now as they did when the orders for the injunctions were made. It is said that a preliminary injunction will not be dissolved until an answer has been put in, or at least until affidavits on the part of the defendants have been filed. In answer to this, it may be said that whatever may be the extent of the rule thus invoked in opposition to these motions, it is still but a rule of practice existing for the relief of the court, and not for the protection of complainants. An interlocutory injunction is entirely at the discretion of the court. It is not a thing of right. Complainants cannot demand it. It is always granted or dissolved according to the will of the chancellor; and if at any stage of the cause he sees fit to dissolve it no right of the complainants is taken away. I admit the general rule to be that when an application to dissolve an injunction is made before answer, it must be supported by affidavits on the part of the defendant in answer to those upon which the injunction was obtained. Decisions to this effect may be found in any number. But the rule is applicable only to cases where the *facts* averred in the bill and special affidavits of the complainants are disputed. It has no relation to cases where the defect is in the complainant's equity, nor in the evidence of his facts. More frequently a motion to dissolve an injunction is based upon a denial of the facts charged in the bill, but a defendant may move to dissolve it on the sole ground of want of equity in the bill; *Minturn* v. *Seymour*, 4 Johns. Ch. 173; *Canal Co.* v. *Railroad Co.* 4 Gill & J. 7. When the motion is

made for such a reason it need not be supported by affidavits, and a bill requiring such support would be absurd.

The facts all appear in the bill of the complainant. They are not controverted. Nothing is in issue but the equity arising out of conceded facts, and affidavits either asserting or denying that, would be a novelty indeed. Neither courts of law or courts of equity, in any case, require the law or the equity to be made to appear by affidavits. The decisions cited in support of the rule of practice referred to have no relation to such cases as the present, which are motions to dissolve injunctions for want of equity in the bill. They could not have been cited unless the distinction between the facts which raise an equity and the equity itself had been overlooked.

Thus, in the case first above cited, Chancellor Kent allowed a motion to be made to dissolve an injunction granted by himself, for the want of equity in the bill, though the defendant had not answered. Nor does it appear that he had submitted any affidavits. And in the *Canal Company* v. *Railroad Company*, above cited, it was said by Chancellor Bland, in reference to a motion to dissolve an injunction, that "if it should appear the facts as stated in the bill, looking to the bill alone, gave rise to no equity, it is very certain that the injunction would be dissolved, whether the defendants had answered or not, or however imperfectly they might have answered." The contest in these cases relates solely to the question whether the complainants have any equity on their own showing. Clearly they have not, if the act of Congress is constitutional. Now, it is not denied that, if the defendants, before these motions were made, had put in answers admitting all the facts charged in the bills, as they might have done, it would be the duty of the court to dissolve the injunctions, if the facts raise no equity in favor of the complainants, and that such a course would be perfectly regular. In what particular would the conscience of the court be better informed had such answers been put in, than it is now? At most, then, the objection urged with so much vehemence to entertaining the present motions, the objections that the cases stand now as they did when the injunctions were granted, is but the minutest technicality, and interposed not in furtherance of justice, but to defeat it. In truth, however, it does not rise even to the dignity of a technicality, for the present motions are founded, not upon a denial of anything that could be verified by affidavit, but upon a want of equity in the bills, and to such motions the rule requiring answers con-

troverting the facts alleged by the complainants is totally inapplicable.

And were it not so, if the rule is for the protection of the court, and not of the complainants, as no one doubts, and if the dissolution of the preliminary injunctions, equally with the grant of them, lies wholly in the sound discretion of the court, as all the books agree, there are abundant reasons in these cases why the motions to dissolve should be entertained, and why the orders heretofore made should be set aside.

The orders were made at Nisi Prius, and they are in fact but the orders of a single judge, though he undoubtedly took the opinions of all his brethren. Still the orders were his, and his alone. They could be nothing more. Our act of Assembly, of July 26, 1842, (P. L. 433, sec. 9,) turns all cases in equity, brought in the Supreme Court, over to the judge at Nisi Prius, and they come into the Supreme Court *in banc* only after final decree. And it was at Nisi Prius that these motions were made. The judge before whom they were made has called in the other judges, not to decide, but to advise what disposition shall be made of them. This he has done from respect to them, and because they advised when the injunctions were ordered. It is not easy to see that any other course would have been decorous. The motions are, therefore, pending. Nothing can be gained or secured by a continuance of the injunctions. The bills on their face show that the complainants must have gone into the military service of the United States, and beyond any possible interference of the defendants, or that they had commuted, or had been exempted, before the injunctions were ordered, and even before the motions for injunctions had been argued.

The orders of the judge at Nisi Prius can, therefore, have no possible beneficial effect upon the condition of the complainants, while if they remain, made as they were, in accordance with the advice of a majority of the judges of the Supreme Court, and upon the ground that the act of Congress is unconstitutional, they hold out to every drafted man a temptation to resist all attempts to coerce him into military service. Unnecessarily to continue such a temptation is cruelty, if a majority of the Supreme Court now believe the act of Congress to be constitutional, and that consequently forcible resistance to it would be a crime.

Again, the orders for the injunctions were made *ex parte* after argument on behalf of the complainants alone. No one attended for the defendants. It is true there was an appear,

ance on record for the defendants in one of the cases, and notice of the motion was served on the solicitor who appeared in that case. But there was no appearance in the other two cases, and there was no proof of notice of the motions to all the defendants. They are not the same in the several cases. If there was laches in responding to the notice of the motion in one case, there is no proof of any laches in the other two. And, in fact, the injunctions were ordered against official action of Government officers. To the Government laches is not to be imputed.

Nor ought it to be overlooked that the orders for the injunctions were in their character extraordinary and unprecedented. When before was an act of Congress ever declared unconstitutional by a State court in deciding upon a motion for an interlocutory order? A just respect for the Government under which we live demands that if there was a mistake in such a case, the court should seize with avidity the earliest opportunity to rectify it instead of persisting in the error under cover of a rule adopted only to secure its own convenience. I may add that in other cases there has been no hesitation in listening to applications for the correction of mistakes into which even the Supreme Court *in banc* has been supposed to have fallen. This very week a motion was entertained in the Supreme Court to change a final judgment given at Pittsburgh at October term last. It was supported by no affidavit, nor had there been any change of the record, or any new pleadings. Yet not a judge hesitated to entertain the motion or to hear an argument in its support and another against it. If such motions are allowed in reference to final judgments, how can it consistently be said that a motion to dissolve injunctions ordered on interlocutory motion, based on the reason that the bill exhibits no equity, may not be entertained, unless accompanied by affidavits denying not the facts, but the equity?

Once more. The records show that the injunctions ordered in these cases have never been issued. They would have been fruitless if they had been. The complainants have filed no bonds, nor have they taken out any injunctions. They have rested satisfied with the orders. The matter therefore remains perfectly within the jurisdiction of the court, even if the dissolution of an injunction itself was not discretionary. These are quite sufficient reasons, in my judgment, for entertaining the present motions, even if the rule of practice, on which the complainants rely, applies to such cases as these. And manifestly it does not. There is nothing in the way of deciding

these motions on their merits. And as I am satisfied that the bills of complainants have no equity, and that the act of Congress is such as Congress has the constitutional power to enact, I think the orders for preliminary injunctions made in all these cases should be rescinded, and that the motions for the injunctions should be overruled.

Such being the opinion of a majority of the judges of the Supreme Court, the orders are directed to be vacated, and the motions for injunctions are overruled.

Intelligence and Miscellany.

In the Utica (N.Y.) *Morning Herald*, of Oct. 23, 1863, there appeared an account of the trial in that city of the case of the Rev. Leicester Ambrose Sawyer *v.* Charles Van Wyck, which is worthy of notice, as having involved a discussion, or at least a giving in evidence, of theological opinions, to an extent quite unusual in civil tribunals at the present day.

Mr. Sawyer, who is the author of various well-known theological works, among others of a notable translation of the New Testament, which appeared a few years since, sought to recover damages laid at $10,000 against the defendant, who is "the publisher of the *Christian Intelligencer*, a New York paper, devoted to the interests of the Reform Protestant Dutch denomination. The plaintiff charges the defendant with publishing in his paper libellous words, in a notice of his book, entitled 'Reconstruction of Biblical Theories, or Biblical Science Improved.'"

"The alleged libellous notice in question, called the contents of the book 'balderdash' and 'twaddle,' and had the following sentence, on which the prosecution was chiefly based:

"On looking over it (the book) we first supposed it to have been written by a lunatic; but recollecting that its author was first a renegade Unitarian from Congregationalism, and then a renegade infidel from Unitarianism, we suspected the existence of a method in his madness.'"

The plaintiff being called to testify in support of his case, was questioned as to his books, especially his book on the "Reconstruction of Bible Theories,"—its circulation, his contract with its publishers, etc. Also, as to his past and present religious and denominational associations. In the course of the cross-examination Mr. Foster proposed to show that Mr. Sawyer was a "renegade infidel." Judge Morgan inquired what an infidel was; and Mr. Foster replied that he was a person who did not believe in the authenticity of the Scriptures. The Judge thought the term indefinite; every man in this free country had a right to his opinions on the subject, and opinions were various; the jury were the proper per-

sons to decide in the case as to the meaning of the terms; he would therefore allow evidence to show what Mr. Sawyer's sentiments were, but not evidence to show that he was a "renegade infidel.'"

The plaintiff proceeded to state his views respecting the authorship of the Pentateuch, the inspiration of the Bible, the errors in its translation, etc.

His counsel then proposed that he should "have an opportunity to justify his opinions," and to prove that he was right, and those who differed from him were in error.

"He was learned in the Hebrew, Syriac, Egyptian, and other ancient languages; had delved into them from his youth, and understood them as few men in any age had."

"The Judge ruled that Mr. S. might show his religious faith, but not his authorities. Mr. Sawyer declared his belief in the doctrines taught by Christ."'

The plaintiff here rested his case.

The defendant was then called to testify concerning the character, circulation, etc., of his paper.

The Rev. Dr. Porter, the editor, testified that the book "was sent to him (Mr. Porter) to be noticed, and he noticed it, as he believed, according to its merits. He had no malice against the plaintiff. The question whether Mr. Sawyer, judging from the book in question, was infidel in the sense used by orthodox Christians, was ruled out.'"

After him the Rev. Ornan Eastman, one of the Secretaries of the American Tract Society, was called to give evidence as to the plaintiff's "ecclesiastical reputation and standing as a clergyman and Christian." This was ruled out.

Rev. Dr. Fowler of Utica, was next called. "He testified that in a conversation with Mr. Sawyer he had told him that he discarded entirely the prevailing orthodox views in regard to the atonement and regeneration. He also stated that he agreed substantially with Bishop Colenso, but went farther; the bishop destroyed, but he both destroyed and built up.

"Further to prove Mr. Sawyer's belief, the defence read lengthy selections from the book on the 'Reconstruction of Biblical Theories."'

Mr. Sawyer being then recalled, stated his views further upon regeneration, the doctrine of the atonement, original sin, the fall of man, etc.

"Mr. Marvin then said, as the opposing counsel had read selections from the book to prove that its contents were "balderdash," "twaddle," etc., he wished to read further selections, to show that they were not. As he had not made his selections, and it seemed necessary to a proper understanding of the book that it should be read through, he asked permission to do so. The opposing counsel did not object, and the judge told him to proceed; and so he commenced with the preface and table of contents, mid the laughter of the bar and other listeners. Mr. Marvin and Mr. Sawyer took turns, and continued the reading for about an hour. This was tedious, and all parties repented the turn things had taken. At length the judge ruled that the entire contents of the book might be received in evidence without further reading; and the business ceased by mutua consent.

"Mr. Foster summed up for the defence in a speech of an hour and a half, criticising the author and his work severely on evangelical grounds in justification of the terms that had been applied to him by the plaintiff.

"Mr. Marvin followed for the plaintiff, in a plea somewhat longer, and went pretty deeply into the theological and philological merits of the questions that had been raised, and Mr. Sawyer's book.

"The judge, in his charge to the jury, distinguished between actions for libel and slander. Slander was oral; libel was written slander. To hold a person up in writing to unjust ridicule and suspicion was libellous. It had appeared from the evidence that Mr. Sawyer was formerly a Congregational clergyman, and had withdrawn from the Oneida Congregational Association, on account of peculiar theological views, and established himself as an Independent Congregationalist. He did not now belong to any orthodox denomination. He had written several works, among them the work which had occasioned the alleged libellous article. The law allows fair editorial criticism, and sometimes men are very lenient, and allow the critics wide latitude of expression; yet one has no right to hold another up to unjust ridicule. No attempt had been made to blacken the plaintiff's character—the defence had not assailed his moral character; and as far as the article in question refers to his moral character, it does not seem to be fully justifiable, unless the fact that his views are not in accordance with received tenets reflects upon his character. The word infidel has no technical or legal signification in this country. In England it had, because England had an Established Church. The simple fact of calling the plaintiff an infidel is not libel. If there is a libel it consists in holding the plaintiff up to unjust and malicious ridicule or opprobrium; yet in this respect editors should have some latitude. In a case like this the opprobious terms should be deducible from the character of the work noticed, and it was for the jury to say whether they were or not. Those who criticise an author should not abuse him unnecessarily. The amount of damages in the case is left wholly to the discretion of the jury, and will depend upon the motives which they attribute to the defendant. If the article in question was libellous, it was rather in calling the plaintiff a 'renegade' and a 'lunatic," than in calling him an 'infidel,' and his book 'twaddle."'

The case resulted in a verdict of a trifling sum for the plaintiff.

For the plaintiff, Mr. LE GRANDE MARVIN, of Buffalo. For defendant, HENRY A. FOSTER, of Rome, and WM. H. WARING, of New York.

We have received an "Address y Hon. Thomas M. Cooley, and a Poem by D. Bethune Duffield, Esq. on the Dedication of the Law Lecture Hall of Michigan University."

Little, Brown and Company, have in press and will shortly publish Gray's Reports Vol. X.—A new edition of Bishop on Marriage and Divorce—Blackwell on Tax Titles, edited by Judge Bennett—and the United States Digest for 1861.

Judge Redfield is busily engaged in the preparation of his new book on

Wills, Executors and Administrators. We anticipate that this will be one of the most valuable treatises ever published.

In Bohn's edition of Lowndes's *Bibliographer's Manual* is a political Jeu d'Esprit, which is perhaps the only copy preserved, written by Lord Macaulay, which was printed and circulated at Lancaster in the summer 1826, and has reference to a fierce contest for that Borough between Sir Charles Abney Hastings, R. M. Otway Cave, and William Evans, Esqrs.—for the latter of whom Lord Macaulay acted as counsel.

"The sparks of all sciences in the world," said Sir Henry Finch, "are taken up in the ashes of the law."

"So great," writes Mr. Hoffman on the 'Study of the Law,' "has been the change in the legal science, even of England, and altogether for the better, that it has been said, that were Lord Coke, with his immense learning, suddenly restored to Westminster Hall, he would find himself compelled to become a close and methodical student of law, before he could venture to take his stand among his professional brethren." "If this were true when it was written, in the year 1836," asks Mr. Warren in his Law Studies, "what would be the condition of the venerable sage, presenting himself at Westminster in 1864"?

In a note to *Vicars* v. *Wilcoks*, 2 Smith's Leading Cases, 426 (4th London ed.) a doubt is intimated, possibly by one of the learned editors (now Mr. Justice Willes), who argued the great case of *Lumley* v. *Gye*, 2 El. & Bl. 216 (1853) "whether that case be sustainable."

"I apprehend," said Mr. Justice Cresswell, "that where in our law Reports we find the expression 'public policy' it is used somewhat inaccurately instead of 'the policy of the law.'" 4 House of Lord Cases, p. 87.

In *Cannan* v. *Reynolds*, 5 El. & Bl. 301 (1855) a plaintiff, as soon as he had discovered the fact, applied to set aside a judgment in his own favor, on the ground of a mistake having been made by himself, in the amount claimed and recovered, although the debt and costs had been actually paid by the defendants. The Court, in furtherance of justice, allowed him to do so.

Almost the only anecdote of a retort against Sir Cresswell Cresswell is told of Edwin James. Sir Cresswell Cresswell had the habit, when taking notes of evidence, of crying out "Stop," to counsel who were going too fast with the examination of a witness, and he not infrequently managed to make even this monosyllable something very like a slap in the face. On one occasion, when Edwin James was examining a witness, Sir Cresswell Cresswell again and again cried out "Stop," in his most authoritative and disagreeable manner, without apparently receiving any attention from the counsel. At length, with some vehemence, he said, "Mr. James, I told you to stop." "Oh, indeed," said Mr. James, "I thought you were addressing the usher of the court;" and the retort was felt to be perfectly fair.

Mr. Charles Scribner of New York announces Maine's Ancient Law, with an Introduction by Theodore Dwight, L. L. D.

Mr. Ram's Treatise on Facts as Subjects of Inquiry by a Jury is an entertaining book. The author quotes largely from Shakespeare and quite often from the Classics. The book will repay a perusal. It was published in 8vo. by Maxwell, London, 1861.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolv	Residence.	Commencement of Proceedings.	Name of Judge.
Bragg, William H.	Taunton,	November 20, 1863,	E. H. Bennett.
Brown, Charles D.	Milford,	" 5, 1863,	Henry Chapin.
Buck, J. W. P. [1]	Adams,	" 10, 1863,	J. T. Robinson.
Burt, Theo. A.	New Bedford,	October 10, 1863,	E. H. Bennett,
Chase, Judah	Harwich,	November 28, 1863,	J. M. Day.
Chase, Obed	New Bedford,	September 16, 1863,	E. H.Bennett.
Davis, Timothy	Gloucester,	November 13, 1863,	George F. Choate.
Dyer, Nathan A.	Cambridge,	November 10, 1863,	Wm. A. Richardson.
Emery, Charles H.	West Newbury,	October 17, 1862,	George F. Choate.
Flynn, Frederick H.	Boston,	November 4, 1863,	Isaac Ames.
Galvin, Daniel	Milford,	October 29, 1863,	Henry Chapin.
Graves, George S.	Boston,	November 19, 1863,	Isaac Ames.
Hall, Soranus	Taunton,	" 3, 1863,	E. H. Bennett.
Hathaway, Benj. F. [1]	Adams,	" 10, 1863,	J. T. Robinson.
Henderson, Lloyd G.	Hanover,	October 14, 1863,	William H. Wood.
Homer, Ephraim	Fitchburg,	" 12, 1863,	Henry Chapin.
Lynde, James P.	Athol,	November 12, 1863,	Henry Chapin.
Newgent, Thomas G.	Milford,	" 30, 1863,	Henry Chapin.
Osborne, Benjamin C.	South Danvers,	October 14, 1863,	George F. Choate.
Parker, James	Woburn,	November 16, 1863,	Wm. A. Richardson.
Patten, Oliver C.	N. Bridgewater,	October 20, 1863,	William H. Wood.
Rich, Henry F.	Haverhill,	November 3, 1863,	George F. Choate.
Snow, William R. [2]	Adams,	" 10, 1863,	J. T. Robinson.
Solentine, Leonard F. [3]	Adams,	" 10, 1863,	J. T. Robinson.
Stickney, Charles H.	Lawrence,	" 4, 1863,	George F. Choate.
Temple, Monroe,	Adams,	September 1, 1863,	J. T. Robinson.
Terry, Isaac F.	New Bedford,	November 13, 1863,	E. H. Bennett.
Welch, Daniel D.	Cambridge,	" 2, 1863,	Wm. A. Richardson.
Wentworth, Eli	Lawrence,	" 18, 1863,	George F. Choate.
Wilkins, Charles	Lowell,	" 14, 1863,	Wm. A. Richardson.
Winchell, Hector [3]	Adams,	" 10, 1863,	J. T. Robinson.
Winchell, Hector [2]	Adams,	" 10, 1863,	J. T. Robinson.

PARTNERSHIPS.

[1] Buck & Hathaway; [2] Snow & Winchell; [3] Solentine & Winchell.